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Regional Trade Agreements in the Era of Globalization: A Legal Analysis

Mohammad F. Nsour

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Regional Trade Agreements in the Era of Globalization: A Legal Analysis

Cover Page Footnote

International Law; Commercial Law; Law

Regional Trade Agreements in the Era of Globalization: A Legal Analysis

Mohammad F. Nsour†

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†Mohammad Nsour is a lecturer and doctoral candidate at McGill University and a member of the Faculty of Law. I acknowledge with appreciation that this article was fully funded by, and a direct product of the Canadian Social Sciences and Humanities Research Council's project on regional trade agreements at McGill University. I am deeply indebted to Professor Armand de Mestral for his guidance and encouragement while I was working on this article. Indeed, the article would have never been possible without Professor de Mestral's proactive personal and academic support. I am also very grateful to my friends, Dr. Chadi El-Zammar who makes himself available for IT-support me 24/7, and for Mark Glynn, who proof-read the original manuscript of this article. Finally, I thank the editors and staff of the North Carolina Journal of International Law and Commercial Regulation, particularly Nicole Jones and Christina Simpson, for their professionalism and dedication. Any errors, omissions and shortcomings remain mine alone.

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I. Introduction

Regional Trade Agreements (RTAs) are preferential trade arrangements that favor their members by reducing trade barriers below the level of reduction under the multilateral system.¹ RTAs are an exception from the rule of non-discrimination, which constitute the cornerstone of the multilateral trade system.² The

¹ See Armand de Mestral, *NAFTA Dispute Settlement: Creative Experiment or Confusion?*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 359 (Lorand Bartels & Federico Ortino eds., 2006) (examining NAFTA's dispute settlement proceedings vis-à-vis the multilateral system).

² See General Agreement on Tariffs and Trade, Prologue, Oct. 30, 1947, 61 Stat.

General Agreement on Trade and Tariffs (GATT) Article XXIV recognizes that the aim of RTAs is to facilitate world trade; this goal is furthered by the inclusion of all trade sectors and diminished by the exclusion of major ones.³

RTAs, however, are gaining attention not only as they increase quantitatively, but also because of the economic and legal challenges they produce.⁴ Various economists have analyzed the economic theory of RTAs and offered divergent opinions on the economic efficiency of RTAs.⁵ However, the legal challenges that RTAs present have not received the same attention as the economic challenges in empirical and theoretical scholarship.⁶ This, in my judgment, results from many reasons; first, there is a misconception that the issue of RTAs is an economic one, and the best way to address it is through economic analysis; second, the strong political factors that are involved in forming RTAs, and their key role after RTAs enter into force, give the impression that

A-11, 55 U.N.T.S. 194 [hereinafter GATT].

³ *Id.*

⁴ See Jacob Viner, *The Customs Union Issue*, in *TRADING BLOCS, ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS* 105, 107 (Jadish Bhagwati & Arvind Panagariya eds., 1999) (Jacob Viner warned that RTAs, especially customs unions can have “trade diversion” consequences. He defines “trade diversion” by arguing that

There will be other commodities which one of the members of the customs union will now newly import from the other whereas before the customs union it imported them from a third country, because that was the cheapest possible source of supply even after payment of duty. The shift in the locus of production is now not as between the two member countries but as between a low-cost third country and the other, high-cost, member country. This is a shift of the type which the protectionist approves, but it is not one which the free-trader who understands the logic of his own doctrine can properly approve.)

⁵ See Pateriiza Tumbarello, *Are Regional Trade Agreements Stumbling or Building Blocks? Implications for Mekong-3 Countries*, 5 (IMF Working Paper No.53, 2007) (describing the negative ramifications of trade diversion); see also Rymond Riezman, *Can Bilateral Trade Agreements Help Induce Free Trade?*, 3, available at <http://www.biz.uiowa.edu/faculty/rriezman/papers/mvb12.pdf> (citing scholars who favor regionalism such as Nordstorm, Perroni and Whalley).

⁶ Few books were written on the legal aspects of regionalism, so far among them are: JAMES H. MATHIS, *REGIONAL TRADE AGREEMENTS IN THE GATT/WTO, ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT* (2002); and *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 359 (2006).

forming RTAs is essentially the result of political and economic processes rather than a legal one; third, the confusion that surrounds the applicable law on RTAs (GATT Article XXIV, GATS Article V, the Enabling Clause, the *Understanding on Article XXIV*, and the *Transparency Mechanism*) makes legal analysis challenging. It is particularly important to understand the economic theory of RTAs before exploring their legal aspects. Finally, the case law on RTAs, particularly in the World Trade Organization (WTO), is still evolving, which discourages legal scholars from adopting positions at this point in time.

Thinking about RTAs as a legal challenge is no less important than analyzing their economic and political impacts. For one, the WTO agreements, as all RTAs, are legal texts that are interpreted pursuant to *The Vienna Convention on the Law of Treaties*.⁷ Likewise, a legal examination is crucial to analyze the relationship between the multilateral and regional trade orders; this analysis cannot be done through a strictly economic lens. Moreover, as will be thoroughly illustrated in this article, WTO panels have been very helpful in addressing controversial issues in RTAs, and arguably, the legal analysis will be central to providing discipline to the high number of RTAs. In short, a close legal examination is timely and worthy because it reveals that RTAs threaten the existence of the WTO by offering alternative trade options to the global-based trading order.

This article seeks to clarify several legal issues posed by RTAs and set them in an analytical framework. Part I describes why WTO Members are forming RTAs, and briefly reviews the economic theory of RTAs. This part is important to define RTAs and why they have developed. Part II identifies the types of RTAs that are recognized by the GATT. It should be noted, however, that other forms of RTAs exist that offer deeper economic integration and were not mentioned by the GATT. Part III focuses on the legal questions that RTAs present, particularly with respect to trade in goods. It also analyzes the substantive and procedural conditions that are encompassed by the relevant WTO rules. In doing so, Part III critically examines key provisions and terms in the WTO law, in particular Article XXIV of the GATT. Perhaps

⁷ SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (Manchester University Press, 2d. ed., 1984).

most importantly, Part IV deals with regionalism in services. In discussing both goods and services, WTO panel decisions will be regularly analyzed. Finally, Part V outlines the efforts that have been made to address the challenges of RTAs. This article concludes by arguing that serious efforts should be made on the regional and the multilateral level to maintain a healthy multilateral system while at the same time ensuring that RTAs adhere to the law pursuant to which they are established.

II. Motivations for Regionalization and the Economic Theories of RTAs

Many legal scholars have stated that RTAs are political phenomena. Commentators cite many overlapping reasons for the rise of RTAs.⁸ First, "the excessive number of participants in the GATT"⁹ in the WTO has made trade negotiations harder and more complex within the GATT as well as within the WTO.¹⁰ Second, the large gap between members' economies makes decision-making even harder.¹¹ Third, major international trade players favor regionalism.¹² Fourth, empirical evidence shows that regionalism is economically and politically beneficial.¹³

Some commentators believe that the first two reasons are not as evident as the third and fourth reasons.¹⁴ Nonetheless, the first three reasons are still very popular justifications for crafting RTAs. Countries have found it easier to associate with other countries with similar levels of economic and political maturity.¹⁵

⁸ See, e.g., JAMES H. MATHIS, *REGIONAL TRADE AGREEMENTS IN THE GATT/WTO, ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT* 140 (2002) (citing Paul Krugman, *Regionalism Versus Multilateralism: Analytical Notes*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 74-75 (Center for Economic Policy Research 1993)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Riezman, *supra* note 5; see also John Whalley, *Why Do Countries Seek Regional Trade Agreements* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 5552, 1996) (highlighting political concerns for countries who form RTAs).

¹⁴ *Id.*

¹⁵ See Mathis, *supra* note 8, at 140 (arguing that the severely uneven distribution of wealth among members make it difficult to reach decisions on controversial trade issues in the WTO, unlike the case where countries negotiate with economically compatible

It is also less difficult to negotiate with fewer countries on trade policies than it is to negotiate with dozens of WTO member-states. Further, concerns over a possible failure of the multilateral trade negotiations have encouraged more countries to form their own markets,¹⁶ especially after the collapse of multilateral negotiations in Mexico in 2003 and the hardships that the Doha Round is encountering.¹⁷

As RTAs proliferate, justifications proliferate too.¹⁸ States strive to strengthen their influence in multilateral trade and international fora.¹⁹ States view RTAs as an "insurance policy" should the multilateral system fail and the "world slip into competing [and perhaps hostile] regional blocks."²⁰ For example, one of the reasons that encouraged Asian and Pacific countries to form the Asia-Pacific Economic Cooperation (APEC) was to counter NAFTA's possible protectionist effects.²¹ Last but not

partners).

¹⁶ See, e.g., Melaku Gebeye Desta, *The Bumpy Ride Towards the Establishment of "a Fair and Market Oriented Agricultural Trading System" at the WTO: Reflections Following the Cancun Setback*, 8 DRAKE J. AGRIC. L. 489 (2003) (discussing the collapse of Cancun's negotiations); see also M. Ulric Killion, *China's Foreign Currency Regime: The Kagan Thesis and Legalification of the WTO Agreement*, 14 MINN. J. GLOBAL TRADE 43, 84 (2004) (stating that the collapse of Cancun multilateral negotiations was because "countries could not come to a consensus and nearly brought a collapse to the Doha Development Agenda").

¹⁷ Desta, *supra* note 16.

¹⁸ Other factors are coming to play when forming RTAs, such as maintaining security as in the case of ASEAN. In 1971, ASEAN leaders signed the Zone of Peace, Freedom and Neutrality Declaration of November 27, 1971. See *Zone of Peace, Freedom and Neutrality*, 27 November, 1971, Indon.-Malay.-Phil.-Sing.-Thail., reprinted in 11 I.L.M. [Kuala Lumpur Declaration].

¹⁹ Bob Switky, *The Importance of Trading Blocks: Theoretical Foundations*, in THE POLITICAL IMPORTANCE OF REGIONAL TRADING BLOCS 13, 18 (Bart Kerremans & Bob Switky eds., 2000). By the same token, states might consider joining an RTA as a method to join a better RTA. This was obvious in Latin America and Europe where:

In some of the Latin American arrangements . . . a group of countries has more leverage in accession negotiations to NAFTA than would individual countries. In Eastern Europe after 1989, the prior regional negotiations between Hungary, Poland and Czechoslovakia helped increase the leverage of each country vis-à-vis EU accession negotiations. *Id.*

²⁰ *Id.*

²¹ *Id.* at 19.

least, other miscellaneous concerns are involved in the formation RTAs, including politics, security (e.g. preventing illegal immigration), and environmental concerns.²²

Economists measure the merits of any RTA in two dimensions: first, the economic benefit that members of an RTA acquire after the formation of the RTA (trade creation), and second, the economic disadvantage that third parties and the parties themselves bear as a result of the formation of RTAs (trade diversion).²³ The first dimension means that intra-regional trade has expanded, which constitutes a positive consequence.²⁴ The second dimension refers to the loss of trade resulting from the formation of an RTA, which is the negative dimension.²⁵ In fact, no RTA has solely trade creation effects; trade diversion will result as a natural and normal consequence of trade creation. Thus, the question in determining the conformity of an RTA to Article XXIV of the GATT is whether trade creation outweighs trade diversion.²⁶

RTA opponents argue that RTAs present a grave challenge to the global economy and the multilateral trade regime because they undermine "the widely-shared objectives of multilateral free trade."²⁷ RTAs are stumbling blocks in the world economy because according to some economists, "negotiators frequently seek to exclude from regional FTAs precisely those sectors that would be most threatened by welfare-enhancing trade creation."²⁸

²² See RACING TO REGIONALIZE: DEMOCRACY, CAPITALISM AND REGIONAL POLITICAL ECONOMY 156 (Kenneth P. Thomas & Mary Ann Tetreault eds., 1999) (explaining the reflections of geopolitics of eastern and western Europe on the citizenship policy of the EU).

²³ See Jacob Viner, *The Customs Union Issue*, in TRADING BLOCS, ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS 105, 107 (Jadish Bhagwati & Arvind Panagariya eds., 1999).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* (explaining that the benefit or the harm to the international economy depends on which dimension predominates, trade creation or trade diversion).

²⁷ Jadish Bhagwati, *Regionalism and Multilateralism: an Overview*, in NEW DIMENSIONS IN REGIONAL INTEGRATION 22, 46 (Jaime de Melo & Arvid Panagariya eds., 1993) (calling the phenomenon of the proliferation of RTAs the spaghetti bowl phenomenon where RTAs create an artifact production network of countries that would not be consistent with the principle of economic efficiency).

²⁸ JEFFREY FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM

Put differently, RTA member-states tend to protect "less-competitive or inefficient domestic industries . . . from the rigors of wide open global competition."²⁹ Similarly, some scholars view RTAs as a major setback for the multilateral trade regime represented by the GATT because RTAs are "discriminatory" and can "be viewed as a factor making for disintegration, rather than integration, within the world economy as a whole."³⁰ For example, Mexican apparel can receive tariff-free treatment within NAFTA only if it is produced with North American textiles and yarn.³¹ In sum, some economists think that the main damage of RTAs is the trade diversion that occurs at the expense of third parties.³²

On the other hand, other economists see that RTAs boost trade and increase trade specialization.³³ The most cited example is the case of Mexico and NAFTA, whereby Mexico's trade benefits are evident.³⁴ Those economists also use empirical research outcomes which prove the constructive role of RTAs in the global economy.³⁵ Likewise, these economists argue that RTAs can be considered a "stepping-stone" towards an ultimate, and fully integrated global economy.³⁶ RTAs, according to regionalists, can

212 (1997).

²⁹ MAY T. YEUNG ET AL., *REGIONAL TRADING BLOCS IN THE GLOBAL ECONOMY: THE EU AND ASEAN* 19 (1999).

³⁰ David Henderson, *International Economic Integration: Progress, Prospect and Implications*, 68 INT'L AFF. 633, 644 (1992).

³¹ Robert Hormats, *Making Regionalism Safe*, 73 FOREIGN AFF. 97, 104 (2004).

³² Anne Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?*, 13 J. ECON. PERSP. 105, 107 (1999).

³³ See, e.g., Robert Zoellick, *Unleashing the Trade Winds*, ECONOMIST, Dec. 5, 2002.

³⁴ See, e.g., *id.*

³⁵ See, e.g., *id.*

³⁶ See *id.* The United States Representative Robert Zoellick asserted that

Whether the cause is democracy, security, economic integration or free trade, advocates of reform often need to move towards a broad goal step by step--working with willing partners, building coalitions, and gradually expanding the circle of cooperation. Just as modern business markets rely on the integration of networks, we need a web of mutually reinforcing trade agreements to meet diverse commercial, economic, developmental and political challenges. The United States is combining this building-block approach to free trade with a clear

be a phase in which countries examine certain liberalization strategies on a regional scale before applying them in a multilateral context.³⁷ In this light, other economists argue that RTAs do not necessarily enhance welfare, yet, they also may not be harmful.³⁸ In other words, these economists approach the issue of RTAs on a case-by-case basis.

III. Regional Trade Agreements that are Recognized by Article XXIV

Article XXIV of the GATT mentions three types of RTAs: Free Trade Agreements (FTAs), Customs Unions (CUs), and interim agreements that lead to the formation of FTAs or CUs.³⁹ Nevertheless, RTAs can take different forms other than those mentioned under Article XXIV, such as Common Markets,⁴⁰ Economic Unions,⁴¹ and Monetary Unions.⁴²

commitment to reducing global barriers to trade through the WTO.

Id.

³⁷ Vincent Cable, *Overview, in* TRADE BLOCS? THE FUTURE OF REGIONAL INTEGRATION 1, 12 (Vincent Cable & David Henderson eds., 1994) (arguing that RTAs are a “useful laboratory for new approaches to deeper integration which can be applied multilaterally”).

³⁸ William Watson & Viet D. Do, *Economic Analysis of Regional Trade Agreements*, <http://www.mcgill.ca/files/economics/economicanalysisof.pdf> (last visited Sept. 12, 2007).

³⁹ GATT, *supra* note 2, art. XXIV:4.

⁴⁰ See, e.g., Nicole Rothe, *Freedom of Establishment of Legal Persons Within the European Union: An Analysis of the European Court of Justice Decision in the Überseering Case*, 53 AM. U.L. REV. 1103 (2004) (analyzing the EU as a common market).

⁴¹ Economic Unions combine members that share long-term economic missions. Economic Unions incorporate common monetary policies, fiscal arrangements, and political autonomy. They also have institutions with high-level capabilities and authorities to manage the monetary, social, and legal harmonization efforts. See, e.g., Bryan Schwartz, *Strengthening Canada: Challenges for Internal Trade & Mobility: Lessons from Experience: Improving the Agreement of Internal Trade*, 2 ASPER REV. INT'L BUS. & TRADE L. 301 (2002) (discussing Canada's trade and commercial policies as an Economic Union).

⁴² See Joshua M. Wepman, *Article 104(c) of the Maastricht Treaty and European Monetary Union: Does Ireland Hold the Key to Success?*, 19 B.C. INT'L & COMP. L. REV. 247 (1996) (defining “Monetary Union”).

A. Customs Unions

Article XXIV:8(a) defines a CU as “the substitution of a single customs territory for two or more customs territories so that duties and other restrictive regulations of commerce...are eliminated with respect to ‘substantially all the trade’ between parties.”⁴³ Yet, the elimination does not have to be absolute;⁴⁴ members of CUs may still exempt trade from liberalization when necessary in light of GATT Articles XI, XII, XIII, XIV, XV, and XX.⁴⁵

Article XXIV:8(a) requires parties who form CUs to implement “substantially the same duties and other regulation of commerce” to trade with other countries.⁴⁶ In other words, CUs are required to have common external tariffs (CET) to be applied to all goods imported into the CU.⁴⁷ To minimize the negative impact on third parties, Article XXIV:5 requires the new CET and the other regulations of commerce not to be “higher or more restrictive” than they were “prior to the formation of the free-trade area.”⁴⁸ Otherwise, if the CETs cause an increase in any individual member’s bound tariffs, paragraph 6 indicates that Article XXVIII shall apply.⁴⁹

B. Free Trade Agreements

FTAs are trade agreements by which member-states eliminate internal trade barriers and tariffs.⁵⁰ FTA members maintain their

⁴³ GATT, *supra* note 2, art. XXIV:8(a).

⁴⁴ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/D34/AB/R (Oct. 22, 1999) [hereinafter *Turkey—Textiles AB Report*]. (The Appellate Body agreed with the Panel that Article XXIV: 8 offers some flexibility, yet the AB warned that this flexibility should not be abused.)

⁴⁵ GATT, *supra* note 2, art. XXIV:8(a).

⁴⁶ *Id.* art. XXIV:8(a)(ii).

⁴⁷ *Id.*

⁴⁸ *Id.* art. XXIV:5(a).

⁴⁹ *Id.* art. XXIV:6. Article XXVIII requires interested parties to negotiate the withdrawal or modification of such duties in order to reach a compensatory arrangement for the affected party. *See generally* Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1125, 1161 art. 4 (1994) [hereinafter *Article XXIV Understanding*].

⁵⁰ De Mestral, *supra* note 1.

original tariff-rates for non-member imports.⁵¹ In this light, Article XXIV identifies FTAs “a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”⁵²

Unlike CUs, FTAs do not have CETs.⁵³ FTAs enable each member to retain its trade policy with third parties.⁵⁴ This characteristic eases economic integration with countries that do not have common borders or are not even geographically close to each other. This fact partially explains why FTAs are the most popular type of RTAs in the world.

One of the primary difficulties associated with FTAs is trade deflection.⁵⁵ In order to prevent exploiting the zero tariff rate between FTA members by third parties, FTAs typically create “rules of origin” to identify which products should be eligible for a tariff-free treatment.⁵⁶ Rules of origin are the method by which goods that qualify to receive tariff-free treatment within the FTA

⁵¹ RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW: THE GATT — WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW* 162 (1998).

⁵² GATT, *supra* note 2, art XXIV: 8(b).

⁵³ See GATT, *supra* note 2, art XXIV: 8.

⁵⁴ *Id.*

⁵⁵ See Jonathan M. Cooper, *NAFTA's Rule of Origin and Its Effect on the North American Automotive Industry*, 14 NW. J. INT'L L. & BUS. 442, 452 (1994); see also WTO Secretariat, *Regional Trade Integration Under Transformation* (Apr. 26, 2002), 10, available at http://192.91.247.23/english/tratop_e/region_e/sem_april02_e/clemens_boonekamp.doc [hereinafter WTO, *Under Transformation*] (explaining that the justification of having rules of origin is to prevent trade deflection).

⁵⁶ See Agreement on Rules of Origins, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 1515 art. 1 (1994) [hereinafter GATT Agreement on Rules of Origin]. The GATT Agreement on Rules of Origin defines rules of origin as:

[T]hose laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.

are identified.⁵⁷ Some commentators, however, are skeptical about the rules of origin since they can be biased.⁵⁸

There are two main categories of rules of origin: preferential and non-preferential.⁵⁹ Preferential rules of origin typically exist in RTAs to distinguish regional products from non-regional like products, thus offering them a preferential treatment.⁶⁰ Non-preferential rules of origin are used to determine a product's country of origin for general purposes other than granting tariff preferences "such as the application of duty rates to imports, antidumping or countervailing duties, country-of-origin marking, or the implementation of country-specific quotas and voluntary export restraints."⁶¹

The Agreement on Rules of Origin sets out general elements of rules of origin.⁶² Article 2 of the *Agreement on Rules of Origin* provides that rules of origin should be: (i) neutral, i.e., WTO members ought not to exploit rules of origin to pursue non-trade policies such as security and environmental policies,⁶³ (ii) non-discriminatory,⁶⁴ (iii) transparent,⁶⁵ predictable and subject to the due process of law.⁶⁶ Alongside this, the agreement established the WTO Committee on Rules of Origin (CRO), and the WTO Technical Committee on Rules of Origin (TCRO) to work on harmonizing rules of origin.⁶⁷ It is crucial to note, nonetheless, that the *Agreement on Rules of Origin* covers only non-preferential

⁵⁷ See generally D. Palmeter, *Rules of Origin in Customs Unions and Free Trade Areas*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM 326 (K. Anderson & R. Blackhurst eds., 1993).

⁵⁸ A.O. Krueger, *Free Trade Agreements as Protectionist Devices: Rules of Origin* 8-12 (Nat'l Bureau of Econ. Research, Working Paper No. 4352, 1993).

⁵⁹ See Joseph A. LaNasa, *Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them*, 90 AM. J. INT'L L. 625, 626 (1996).

⁶⁰ *Id.*

⁶¹ Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. 401, 463 (2002).

⁶² See generally GATT Agreement on Rules of Origin, *supra* note 56.

⁶³ See *id.* art. 2(b) and (c).

⁶⁴ See *id.* art. 2(d).

⁶⁵ See *id.* art. 2(a).

⁶⁶ See *id.* art. 2(e) and (j).

⁶⁷ See *id.* art. 4.

rules of origin and not preferential rules of origin.⁶⁸ Similarly, unlike some RTAs that have rules of origin for investments and services,⁶⁹ the *Agreement on Rules of Origin* does not cover services or investments.⁷⁰ The *Agreement on Rules of Origin* attempted to create a framework for harmonizing non-preferential rules of origin by setting timetables for this purpose, but all deadlines were missed due to the large number of goods involved and the controversial nature of some products such as textiles.⁷¹

C. Interim Agreements

Building an RTA requires extensive coordination between the prospective members. RTA member-countries are usually required to amend their domestic laws in response to increased integration.⁷² Therefore, Article XXIV approves interim agreements as providing a transition period to forming CUs or FTAs. Pursuant to Article XXIV:(5), the purpose of interim agreements is the formation of a CU or an FTA.⁷³ Interim agreements shall “include a plan and schedule” that specifies how parties will use the interim agreement to form their RTA “within a reasonable length of time.”⁷⁴ Due to the fact that “reasonable length of time” is a broad concept, the *Understanding on Article XXIV* sets out that the reasonable length of time should not exceed ten years, unless “exceptional circumstances” require otherwise.⁷⁵

Two main concerns arise from the issue of interim agreements.

⁶⁸ Org. for Econ. Co-operation and Dev. [OECD], Working Part of the Trade Comm., *The Relationship Between Regional Trade Agreements and Multilateral Trading System Rules of Origin*, at 6, TD/TC/WP(2002)17/Final (Apr. 11, 2002) [hereinafter *OECD Rules of Origin*].

⁶⁹ NAFTA, in its cross-border trade chapter, established flexible rules for services to enjoy free movement within NAFTA's borders.

⁷⁰ See *OECD Rules of Origin*, *supra* note 68.

⁷¹ RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 666 (Lexis Publishing 2d ed. 2001).

⁷² Countries who sign FTAs with the US are required to amend, for example, their laws to meet certain US requirements, such as intellectual property rights requirements. See Peter Drahos, *Expanding Intellectual Property's Empire: the Role of FTAs* 7, available at http://www.bilaterals.org/article.php3?id_article=401.

⁷³ GATT, *supra* note 2, art. XXIV: 5(c).

⁷⁴ *Id.*

⁷⁵ See Article XXIV Understanding, *supra* note 49, ¶ 3.

First, countries are not reporting their interim agreements so that the WTO can examine their consistency with Article XXIV (according to paragraph 7 (a) of Article XXIV).⁷⁶ Parties to RTAs sideline the whole concept of interim agreements by stating that they will implement their RTA gradually over a period of time that might exceed ten years.⁷⁷ Such schemes enable members of RTAs to overcome the notification requirement to the WTO regarding the terms of their RTAs, and to have more leeway in deciding the details of their agreements.⁷⁸ The second concern that arises is whether the conditions applied to FTAs and CUs, particularly the requirements of Article XXIV:(5) and (8), also apply to interim agreements.⁷⁹

IV. Legal Issues Posed by the Applicable Law

A. The Purpose of Regional Trade Agreements: Article XXIV:4 & 5

Article XXIV:5 states that “the provisions of [the GATT Agreement] shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area.”⁸⁰ This issue was discussed in an important case that dealt with Turkey’s quotas which constituted a wide range of quantitative restrictions on textiles and clothing, including those from India.⁸¹ In the *Turkey—Restrictions on Imports of Textiles and Clothing Products* case, India objected to Turkey’s quotas and claimed they were inconsistent with Articles XI and XIII of the GATT 1994, as well as Article 2 of the *Agreement on Textiles and*

⁷⁶ See World Trade Organization, Negotiating Group on Rules, *Compendium of Issues Related to Regional Trade Agreements*, ¶ 55, WTO DOC. TN/RL/W/8/REV.1 (Aug. 1, 2002), available at http://www.wto.org/english/tratop_e/region_e/region_negoti_e.htm [hereinafter *Regional Trade Agreements*] (stating that “very few have expressly been notified as [interim agreements]. As a consequence, many of the detailed provisions specifically devoted to this type of RTA, both in Article XXIV and in the 1994 Understanding, have practically become redundant”).

⁷⁷ See *id.* ¶ 57.

⁷⁸ See *id.*

⁷⁹ *Id.* ¶ 57.

⁸⁰ GATT, *supra* note 2, art. XXIV:5.

⁸¹ *Turkey—Textiles AB Report*, *supra* note 44.

Clothing (ATC).⁸² In its defense, Turkey claimed its quotas were justified measures in the formation of a CU with the European Union (EU) and therefore conformed to Article XXIV of the GATT.⁸³ Turkey asserted that the quotas were necessary in forming the CU with the EU, and that Article XXIV:8 specifically requires parties to CUs to harmonize their customs policies.⁸⁴ The Panel found that Turkey's measures were inconsistent with Articles XI and XIII of the GATT 1994, and consequently inconsistent with Article 2.4 of the ATC.⁸⁵ The Panel also rejected Turkey's assertion that its measures were justified by Article XXIV of GATT 1994.⁸⁶ The Appeals Board (AB) in this case upheld the Panel's decision, although it differed in its reasoning.⁸⁷

In dealing with the meaning of "shall not prevent" in Article XXIV:5, the AB in the *Turkey—Textiles* case clarified the meaning of "shall not prevent" by indicating that "the provisions of the GATT 1994 *shall not make impossible* the formation" of an RTA.⁸⁸ The AB highlighted the chapeau of Article XXIV by noting that inconsistent measures with the GATT's provision are permissible only to the extent necessary to form an RTA.⁸⁹ The AB went further to set up two conditions that RTAs must fulfill when using the chapeau as a defense: first, RTA member-countries should prove that their RTA has satisfied the requirements of Article XXIV:8(a) and 5(a), and second, RTA members should show it would be impossible to form the RTA unless "the measure at issue is introduced" upon the formation of the RTA.⁹⁰ It is not yet known whether this also applies to FTAs since the *Turkey—Textiles* case dealt with a CU issue and not an FTA issue.

Article 3.2 of the *Understanding on Rules and Procedures*

⁸² *Id.* § 24.

⁸³ *See id.* §§ 6-7.

⁸⁴ *See id.* § 10.

⁸⁵ *Id.* § 42.

⁸⁶ *Id.*

⁸⁷ *Turkey—Textiles AB Report, supra* note 44, §§ 64-66.

⁸⁸ *Id.* ¶ 45.

⁸⁹ *Id.* ¶¶ 45-46.

⁹⁰ *Id.* ¶¶ 58-59.

Governing the Settlement of Disputes (DSU)⁹¹ states that WTO agreements should be interpreted in accordance with the customary rules of interpretation of public international law. With this in mind, Article XXIV:4 stipulates that:

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.⁹²

The drafters of the GATT confirmed in paragraph 4 of Article XXIV that the trade liberalization between the members of RTAs should not be at the expense of non-members.⁹³ The *Understanding on Article XXIV* complemented this concept by recognizing the importance of RTAs in the global economy, and the positive impacts of the liberalization of "all trade" between the members of an RTA.⁹⁴ The *Understanding* asserted, however, that RTAs "should to the greatest possible extent avoid creating adverse effects on the trade of other Members."⁹⁵ The drafters of Article XXIV and the *Understanding* implied that full liberalization of trade is less trade-diverting than partial liberalization.⁹⁶ Nonetheless, many economists such as Bhagwati argue that trade diversion will occur even if RTA members adopt full-preference regimes.⁹⁷

The AB in the *Turkey—Textiles* case affirmed the obligation of facilitating trade and not raising barriers by invoking Article

⁹¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 art. 16.4, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 401, 411, 33 I.L.M. 1125 (1994) [hereinafter DSU].

⁹² GATT, *supra* note 2, art. XXIV:4.

⁹³ *See id.*

⁹⁴ *See* Article XXIV Understanding, *supra* note 49.

⁹⁵ *Id.*

⁹⁶ *See generally* GATT, *supra* note 2, art. XXIV; Article XXIV Understanding, *supra* note 49.

⁹⁷ Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 LAW & POL'Y INT'L BUS. 865, 868 n.5 (1996).

XXIV:4, and by emphasizing that the *Understanding* “explicitly reaffirms this purpose,” and states that in the formation or enlargement of a customs union, the constituent members should “to the greatest possible extent avoid creating adverse affects on the trade of other Members.”⁹⁸ The AB report went further to state that paragraph 4 contains a “purposive” obligation, and not an “operative” one.⁹⁹ This means that paragraph 4 should be taken into account when interpreting any other paragraph of Article XXIV, including the chapeau of paragraph 5.¹⁰⁰ Consequently, the purpose of RTAs, according to Article XXIV, should be to expand trade between the members of RTAs, and avoid, as much as possible, the negative consequences of RTAs on third parties.¹⁰¹

Some scholars argue that Article XXIV:4 highlights the economic framework of the whole article by which the legal aspects should be understood.¹⁰² Kenneth Dam argues in this regard that Article XXIV should be construed to provide for trade-creation standards by emphasizing that “[p]aragraph 4 sets forth what could be considered the principal rule.”¹⁰³ This point of view was argued by the representatives of several WTO members such as Australia and Korea in the fifteenth session of the Committee of Regional Trade Agreements (CTRA).¹⁰⁴ Those members asserted that “Article XXIV:4 not only provided a guiding principle, but also complemented other paragraphs in a substantive way.”¹⁰⁵ On

⁹⁸ *Turkey—Textiles AB Report*, *supra* note 44, ¶ 57.

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ *See* GATT, *supra* note 2 Article XXIV: 4. Article XXIV states that:

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

¹⁰² *See, e.g.,* KENNETH DAM, *THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 276 (1970).

¹⁰³ *Id.*

¹⁰⁴ World Trade Organization, Comm. on Reg'l Trade Agreements, *Note on the Meetings of 27 November and 4-5 December 1997*, ¶¶ 19-20, WT/REG/M/15 (Jan. 13, 1998) [hereinafter CRTA WT/REG/M/15].

¹⁰⁵ *Id.*

the other side of the spectrum, the United States' representative argued that "[t]here was no test in Article XXIV:4, and it was never intended that there should be one."¹⁰⁶ She argued that the first paragraph of the *Understanding* provided that, to be consistent, an RTA had to satisfy the provisions of paragraphs 5, 6, 7 and 8."¹⁰⁷ The EU representative strongly agreed with the United States.¹⁰⁸

Finally, the AB in the *Turkey—Textiles* case stated that Article XXIV:4 "does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV."¹⁰⁹

B. Substantive Conditions

1. "Substantially All the Trade": Article XXIV:8

To minimize affecting third parties, GATT Article XXIV:8 requires that RTA members must eliminate trade restrictions with respect to "substantially all the trade" between the "constituent territories" of the RTA.¹¹⁰ Regarding CUs, Article XXIV:8(a) states that

Duties and other restrictive regulations of commerce (except where necessary, those permitted under Articles XI, XII, XIII, XIV, XV, XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories¹¹¹

Whereas regarding FTAs, Article XXIV:8(b) states that "[d]uties and other restrictive regulations of commerce (except where necessary, those permitted under Articles XI, XII, XIII, XIV, XV, XX) are eliminated on substantially all the trade between the constituent territories in products originating in such

¹⁰⁶ *Id.* ¶ 24.

¹⁰⁷ *Id.* ¶ 24.

¹⁰⁸ *Id.*

¹⁰⁹ *Turkey—Textiles AB Report*, *supra* note 44, ¶ 57.

¹¹⁰ GATT, *supra* note 2, art. XXIV:8.

¹¹¹ Article XXIV:8 (a).

territories”¹¹² Article XXIV differentiates between “substantially all the trade” in FTAs and in CUs.¹¹³ In the case of CUs, duties and restrictions on trade ought to be eliminated either with respect to substantially all the trade between the CU members, or with respect to substantially all trade in goods originating within the CU borders.¹¹⁴ On the other hand, FTAs are only required to eliminate restrictions on substantially all the trade in products originating in the FTAs’ territories.¹¹⁵ This differentiation reflects the nature of both CUs and FTAs; CUs are a more advanced type of trade liberalization because trade barriers are eliminated irrespective of the origin of goods (once they enter the CU). In Article XXIV:8(b) however, trade barriers should be eliminated solely on goods originating in the FTA territories.¹¹⁶

Debates have always revolved around whether “substantially all” should be understood in qualitative terms (exclusion of major sector) or quantitative ones (percentage of trade of the members covered).¹¹⁷ GATT working parties that were established to examine regional trade agreements, and later the Committee on Regional Trade Agreements (CRTA), have not been able to arrive at a precise conclusion on the meaning and implications of “substantially all the trade.”¹¹⁸ To date, there is no consensus on what percentage could be deemed “substantially,” or “all the trade.”¹¹⁹

Some WTO working parties, like Hong Kong and China SAR attempted to define “substantially all the trade” through the percentage of trade covered.¹²⁰ However, the exact percentage has

¹¹² Article XXIV: 8 (b).

¹¹³ Article XXIV:8 (a) and (b).

¹¹⁴ Article XXIV:8 (a).

¹¹⁵ Article XXIV:8 (b).

¹¹⁶ *Id.*

¹¹⁷ Bhala *supra* note 71, at 625.

¹¹⁸ See World Trade Organization, Comm. on Reg'l Trade Agreements, *Note on the Meetings of 16-18 and 20 February 1998*, ¶ 115, WT/REG/M/16 (Mar. 18, 1998) [hereinafter CRTA WT/REG/M/16] (where New Zealand suggested the removal of the whole term of “substantially” due to its ambiguity).

¹¹⁹ *Id.*

¹²⁰ *Id.* ¶ 111.

never been agreed upon.¹²¹ For instance, the EC delegation suggested in 1998 that "substantially all the trade" entailed eighty percent of total trade volume.¹²² Moreover, the EC delegation argued that the wording of Article XXIV says "substantially all the trade" and not "substantially all the products," thus excluding a sector of trade is not inconsistent with Article XXIV.¹²³ This opinion met different reactions.¹²⁴ Some members stressed that any percentage to determine the substantiality of trade should be determined on a case-by-case basis because RTAs are all different from each other.¹²⁵ Even if a percentage were agreed upon, an arithmetical calculation of it would be almost impossible from an economic perspective.¹²⁶ On the other hand, those who argued that substantially all the trade implies a qualitative approach, stressed that leaving out an entire sector cannot be consistent with the requirements of Article XXIV to show a commitment to close economic integration.¹²⁷

Scholars have also attempted to provide accurate explanations when addressing the meaning of "substantially all the trade."¹²⁸ Mathis, for instance, adopted a middle view "that would permit duties together with other restrictive regulations to be counted together in determining whether substantially all trade was being covered by the agreement," while applying a strict view by contending that duties are to be eliminated on all of the trade.¹²⁹ This imprecision in defining "substantially all the trade" made it difficult for RTA parties or prospective RTA parties to prove the compatibility of their RTA with the requirements of Article

¹²¹ See, e.g., *id.* § 131.

¹²² *Id.*

¹²³ See European Free Trade Association, *Examination of Stockholm Convention*, L/1235 (June 4, 1960), GATT B.I.S.D. (9th Supp.) at 70 (1960).

¹²⁴ See generally The European Economic Community, *Reports Adopted on 29 November 1957*, ¶ 30, L/778 (March 1958), GATT B.I.S.D. (6th Supp.) at 70 (1957).

¹²⁵ *Id.*

¹²⁶ See generally *id.*; see also S.J. Wei & J.A. Frankel, *Open Versus Closed Blocs*, in REGIONALISM VERSUS MULTILATERAL TRADE ARRANGEMENTS 123 (T. Ito & A. O. Kruger eds., 1997).

¹²⁷ CITA WT/REG/M/16, *supra* note 118.

¹²⁸ Sunjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A Perspective on Trade Regionalism*, 42 HARV. INT'L L. J. 419, 436-37.

¹²⁹ MATHIS, *supra* note 8, at 65.

XXIV.¹³⁰ For example, in 1965 Australia and New Zealand crafted an FTA that initially covered only half of the trade between them and considered this coverage compatible with Article XXIV.¹³¹ Others argue that it is still hard to set a standard for what constitutes “substantially all the trade,” and therefore, the best option is to have a case-by-case approach.¹³²

Unfortunately, the *Understanding of Article XXIV* was not helpful in addressing the matter of trade coverage. It merely noted that the contribution to the expansion of world trade through closer integration between the relevant economies is diminished if any major sector of trade is excluded.¹³³ In other words, it did not come with anything new and did not establish any obligations in this regard.

The AB in the *Turkey—Textiles* case highlighted the meaning of “substantially” in two ways.¹³⁴ The AB adopted Dam’s analysis when it remarked “that ‘substantially all the trade’ is not the same as all the trade;” yet it “is something considerably more than merely some of the trade.”¹³⁵ The AB also added that the term “substantially all” contains both qualitative and quantitative meanings by finding that

[T]he ordinary meaning of the term “substantially” in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression “substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union” would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.¹³⁶

Likewise, the AB interpreted Article XXIV:8(a)(ii) (which

¹³⁰ Sunjoon Cho, *supra* note 128, at 436-37.

¹³¹ See *Conclusions Adopted on 5 April 1966* (July 1966), GATT B.I.S.D. (14th Supp.) at 20, 22 (1966); *Report of Working Party Adopted on 5 April 1966*, L/2628 (July 1966), GATT B.I.S.D. (14th Supp.) at 115, 115-16 (1966).

¹³² Sunjoon Cho, *supra* note 128, 442-43 (2001) (highlighting the impracticability of agreeing on one meaning of “substantially all the trade”, and giving an example that EEC countries proposed an 80% of liberalized trade to be considered “substantially all”).

¹³³ See Article XXIV Understanding, *supra* note 49, introduction.

¹³⁴ See *Turkey—Textiles AB Report*, *supra* note 44, ¶48-50.

¹³⁵ See *id.* ¶ 48.

¹³⁶ *Id.* ¶ 49.

requires CUs to have “substantially the same” trade regulations with non-members) by declaring that although paragraph 8 of Article XXIV offers some degree of flexibility, “substantially the same regulations” demands “approximating sameness,” and not only a degree of comparability.¹³⁷ By the same token, the Panel in the *United States—Line Pipe* case found that the United States had established a *prima facie* case when it produced evidence that NAFTA eliminated duties in 97% of the parties’ tariff lines, which was unquestionably deemed substantially all trade.¹³⁸ Yet it should be noted that the interpretation of *Turkey—Textiles* case applies only to CUs and not FTAs since the issue of the case was chiefly the CU between Turkey and the EC.

2. “Duties and Other Restrictive Regulations of Commerce”: Article 8

Article XXIV:8 states that “duties and other restrictive regulations of commerce” (ORRCs) should be eliminated on substantially all the trade between RTA partners.¹³⁹ Just like other Article XXIV terms, disagreements exist on what constitute ORRCs.¹⁴⁰ One should note, however, that there is a difference between ORRC in paragraph 8 and “other regulations of commerce” (ORCs) mentioned in paragraph 5.¹⁴¹ ORCs are more comprehensive than ORRCs because the term restrictive “equates easily with border protective measures.”¹⁴² As a result, ORCs include “anything and everything that affects the quality of

¹³⁷ *Id.* ¶ 50 (overruling the panel’s finding that substantially all the regulations means “comparable with similar effects on third parties”).

¹³⁸ See Panel Report, *United States- Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶¶ 7.130, 7.144, WT/DS202/R (Mar. 8, 2002) [hereinafter *United States – Line Pipe*]. The AB, however, found that this issue is irrelevant, and the finding of the Panel in this respect has no legal effect. See Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (Mar. 8, 2002) [hereinafter *United States –Line Pipe AB Report*].

¹³⁹ GATT, *supra* note 2, art XXIV:8(a)(i)-(b).

¹⁴⁰ See James Mathis, *Other Restrictive Regulations of Commerce? in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 359 (Lorand Bartels & Federico Ortino eds., 2006).

¹⁴¹ GATT, *supra* note 2, art XXIV:5, art XXIV:8.

¹⁴² *Id.* at 10.

external trade, whether or not the subject matter falls within the WTO Agreements.”¹⁴³ In other words, Article XXIV:8 does not encompass all regulations of commerce that affect regional trade however small; rather, it covers those regulations that have direct restrictive effects on the flow of goods between regional members.¹⁴⁴ The term ORCs will be inspected thoroughly in the next section because it is part of paragraph 5 and has different implication than the ORRCs of paragraph 8.

The major issue in paragraph 8 is whether or not the listing of Articles XI (quantitative restrictions), XII (restrictions for balance of payments purposes), XIII (non-discriminatory administration of quantitative restrictions), XIV (exceptions to the rules of non-discrimination), XV (exchange arrangements), and XX (general exceptions) is exhaustive or only indicative.¹⁴⁵ Such a distinction is important to know because for example, the distinction can help explain whether members can exclude the application of safeguards and anti-dumping measures between the RTA members.

We first explore whether the listing of Article XXIV:8 is exhaustive or indicative. While we examine the arguments of those who believe that the list is indicative, we go back to the question of safeguards and explore the safeguards issue in paragraph 8 as set forth in Part III: B (1).¹⁴⁶

A minority of commentators argue that in relation to ORRCs, Article XXIV is exhaustive, and safeguards cannot be included in its meaning.¹⁴⁷ In other words, as long as safeguards are not mentioned in Article XXIV, this should be a sign that it is not ORRCs. If there is no ‘inter alia’ reference, Article XXIV as drafted facially manifests an exclusive listing.¹⁴⁸ Those who argue this point of view, such as Mathis, maintain that the list should be

¹⁴³ *Id.*

¹⁴⁴ Nicholas Lockhart & Andrew Mitchell, *Regional Trade Agreements under GATT 1994: An Exception and its Limits*, in CHALLENGES AND PROSPECTS FOR THE WTO 217, 237 (Andrew Mitchell ed., 2005).

¹⁴⁵ *Id.*

¹⁴⁶ GATT, *supra* note 2, art. XXIV:8.

¹⁴⁷ See generally Mathis, *supra* note 140, 92-93 (arguing that Article XXIV:8, which deals with ORRC should be interpreted to limit ORRC is limited in scope as the literal reading of the text).

¹⁴⁸ *Id.* at 6.

understood to be exhaustive as long as there is no clear definition of what “substantially all the trade” is because this would permit measures not mentioned in the list to be applied to the remainder of “substantially all the trade” coverage.¹⁴⁹ This campaign raises a policy concern which is that “regional members can eliminate internally troublesome sectors while discriminating against non-members for the balance of trade.”¹⁵⁰ Furthermore, scholars who adopt this point of view argue that excluding other articles such as Article XIX makes sense because Article XIX is an emergency measure that might be taken in response to unforeseen circumstances.¹⁵¹ Those circumstances are typically rare and would be frozen after the given circumstances cease, thus tariffs are returned to their original levels.¹⁵²

Now we turn to the point of view that argues the listing is indicative. For example, does paragraph 8 permit members of an RTA to apply safeguards to products originating in the RTA? After considering the *Turkey—Textile* case, some commentators noted that the AB found that “the terms of sub-paragraph 8(a)(i) offer ‘some flexibility’ to the constituent members of a customs union when liberalizing their internal trade”; those commentators then noted that this finding is very rational because it will permit applying safeguards between regional trade partners.¹⁵³ The AB, however, emphasized that the flexibility depends upon the condition that ORRCs be eliminated with respect to substantially all internal trade.¹⁵⁴ Another point of view on this issue agrees that safeguards are definitely ORRCs as long as they are within the insubstantial portion of the trade that is excluded for liberalization.¹⁵⁵ Nonetheless, this point of view was found to be

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Michael Hart, *GATT Article XXIV and Canada-United States Trade Negotiations*, 1 R.I.B.L. 317, 333 (1987). Real life shows that safeguards are not rare anymore. The number of safeguards disputes before the WTO alone is more than 30, as of March 1, 2006.

¹⁵² *See id.*

¹⁵³ Joost Pauwelyn, *The Puzzle of WTO Safeguards and Regional Trade Agreements*, 7 J. INT'L ECON. L. 109, 127 (2004).

¹⁵⁴ *Id.*

¹⁵⁵ Lockhart, *supra* note 144, at 240 (mentioning a strict interpretation of whether products subject to ORRC listed in the brackets are part of “substantial or insubstantial

weak because, for example, Article XX permits members to prioritize concerns like health and public policy over GATT obligations.¹⁵⁶ This point of view implies that Article XX of the GATT provides that “nothing in this Agreement shall be construed to prevent the adoption or enforcement . . . of measures a) necessary to protect public morals . . . [or] (f) imposed for the protection of national treasures of artistic, historic or archaeological value.”¹⁵⁷ Thus, if paragraph 8 means that an Article XX measure can only be applied to the “insubstantial” portion of trade, then “the interpretation would prevent the adoption or enforcement of [Article XX] on ‘substantially all the trade,’ contrary to Article XX.”¹⁵⁸ Finally, there are those who argue that the list in paragraph 8 is indicative, stressing that Article VI, just like Article XIX, is excluded from the list; hence, if the list were exclusive, “all intra-regional anti-dumping and countervailing duties would also be prohibited.”¹⁵⁹

The first jurisprudential opinion in this regard was adopted by the Panel in the *Argentina–Safeguard Measures on Imports of Footwear* case.¹⁶⁰ In the *Argentina–Footwear* case, the EC complained about provisional and definitive safeguard measures on imports of footwear.¹⁶¹ The EC alleged that the safeguard measures violated Articles 2, 4, 5, 6, and 12 of the *Agreement on Safeguards*, and Article XIX of GATT 1994.¹⁶² The Panel found that Argentina’s safeguards were inconsistent with the *Agreement on Safeguards*.¹⁶³ The AB upheld the Panel’s decision with respect to the incompatibility of the safeguards with the *Agreement on Safeguards*, yet it reversed certain findings and conclusions of the panel; those reversals relate to the relationship

portion of trade”).

¹⁵⁶ *Id.*

¹⁵⁷ Raj Bhala, *INTERNATIONAL TRADE LAW HANDBOOK* 664 (Lexis Publishing 2001).

¹⁵⁸ Lockhart, *supra* note 144, at 241.

¹⁵⁹ Pauwelyn, *supra* note 153, at 127 n.42.

¹⁶⁰ See Panel Report, *Argentina–Safeguard Measures on Imports of Footwear*, WT/DS121/R (Jan. 12, 2000) [hereinafter *Argentina—Footwear Panel Report*.]

¹⁶¹ *Id.* ¶ 5.149.

¹⁶² *Id.* ¶ 3.1.

¹⁶³ *Id.* ¶ 9.1.

between the *Agreement on Safeguards* and Article XIX of GATT 1994 on the one hand, and to the use of Article XXIV as a defense to impose the safeguards on the other.¹⁶⁴

The *Argentina—Footwear* case considered safeguards and anti-dumping duties as ORRCs.¹⁶⁵ The rationale for this argument was that “that the obligation of Article XXIV:8 to eliminate all duties and other restrictions of commerce applies only to “substantially all” but not necessarily to “all” trade between the constituent territories.”¹⁶⁶ Article XIX also indicates that safeguard measures can be modifications or withdrawals of concessions on imports.¹⁶⁷ Moreover, the Panel noted that footnote 1 of the *Agreement on Safeguards* mentioned Article XXIV:8, which could mean that safeguards could indeed be considered as ORRCs.¹⁶⁸ With regard to this, the Panel in *Argentina—Footwear* case considered safeguards as ORRCs.¹⁶⁹ The AB however, reversed the finding of the Panel on Article XXIV in general because it decided that this question was irrelevant to the case and thus should not have been discussed.¹⁷⁰

A final point that merits attention is the meaning of the word “necessary” in paragraphs 8(a) and (b) when those paragraphs state that “[d]uties and other restrictive regulations of commerce (except where necessary, those permitted under Articles XI, XII, XIII, XIV, and XX) are eliminated with respect to substantially all the trade between RTAs’ members.”¹⁷¹ No WTO panel thus far has decided on when a necessity occurs that will allow recourse to

¹⁶⁴ *Argentina—Footwear Panel Report*, *supra* note 160, ¶¶ 8.96 & 97. The Panel Report stated that “Although the list of exceptions in Article XXIV:8 of GATT clearly does not include Article XIX, in our view, that paragraph itself does not necessarily prohibit the imposition of safeguard measures between the constituent territories of a customs union or free-trade area during their formation or after their completion.” The AB Report did not reject this *per se*, but found that this matter was irrelevant to the case. See Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear*, ¶ 110, WT/DS121/AB/R (Jan. 12 2000) [hereinafter *Argentina-Footwear AB Report*].

¹⁶⁵ *Argentina—Footwear Panel Report*, *supra* note 160, ¶¶ 8.96 & 8.97.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 8.90

¹⁶⁹ *Argentina—Footwear Panel Report*, *supra* note 160.

¹⁷⁰ *Argentina—Footwear AB Report*, *supra* note 164.

¹⁷¹ GATT, *supra* note 2, art. XXIV:8(a)-(b).

the list of exceptions in paragraphs 8:(a) and (b). Some researchers have suggested in this regard that the necessity test of paragraph 5 should be adopted.¹⁷² Put differently, necessity in paragraph 8 can be specified by the extent that a formation or continuation of an RTA would be prevented if an ORRC mentioned were eliminated.¹⁷³

3. *“ORCs” Not on the Whole Higher or More Restrictive: Article XXIV:5*

The main objective of Article XXIV:5 is to ensure that RTAs do not negatively affect third parties.¹⁷⁴ To this effect, Article XXIV:5 reads as follows:

[Th]e provisions of this Agreement shall not prevent...the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided that*:

(a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be¹⁷⁵

¹⁷² Lockhart, *supra* note 144, at 240.

¹⁷³ *Id.*

¹⁷⁴ GATT, *supra* note 2, art XXIV:5(a)-(b).

¹⁷⁵ *Id.*

The above paragraphs have generated intense discussions between GATT members in an attempt to agree on how to examine "the general incidence of duties" and ORCs.¹⁷⁶ For instance, the working parties explored the question of whether "the general incidents of duties" should be calculated on a product-by-product basis or be based on a sector-by-sector assessment; if calculated on a product by product basis, this would occur "after the creation of the CU vis-à-vis the general incidence of duties applied by each of the CU's members before it enters into force."¹⁷⁷

To explain how to evaluate the duties and ORCs before and after the formation of CUs, paragraph 2 of the *Understanding* requires that the evaluation under Article XXIV:5(a) of the general incidence of duties applied before and after the formation of a customs union "be based upon an overall assessment of weighted average tariff rates and of customs duties collected" before and after the formation of the CU.¹⁷⁸ To facilitate this calculation, the CU has the duty to provide the WTO with the necessary data, so that the latter can calculate the weighted average tariffs according to Article XXIV:5(a) and to paragraph 2 of the *Understanding*.¹⁷⁹ Put differently, the words "on the whole" and "general incidence" imply that the comparative examination should be based on the overall effect of the ORCs, and not on individual ORCs.¹⁸⁰ If ORCs overall are more restrictive than they were before the formation of the RTA, then Article XXIV cannot serve as a defense.

Notably, the AB in the *Turkey—Textiles* case was satisfied with the accuracy of the "economic test" provided in the *Understanding*,¹⁸¹ where that Understanding indicated that

[b]efore the agreement on this Understanding, there were different views among the GATT Contracting Parties as to

¹⁷⁶ Robert Hudec & James Southwick, *Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly*, in *TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS* 47, 53 (Miguel R. Mendoza et al. eds., 1999).

¹⁷⁷ *Id.*

¹⁷⁸ See Article XXIV Understanding, *supra* note 49, ¶ 2.

¹⁷⁹ *Id.*

¹⁸⁰ See *id.*

¹⁸¹ *Turkey—Textiles AB Report*, *supra* note 44, ¶¶ 53-55.

whether one should consider, when applying the test of Article XXIV:5(a), the bound rates of duty or the applied rates of duty. This issue has been resolved by paragraph 2 of the *Understanding on Article XXIV*, which clearly states that the *applied* rate of duty must be used.¹⁸²

However, neither the Panel nor the AB in *Turkey—Textiles* case illustrated the role of the WTO CRTA in conducting the calculation.¹⁸³ Furthermore, the Panel in the *Turkey—Textiles* case made a significant step by defining ORCs in paragraph 5 as covering:

[a]ny regulations having an impact on trade such as measures in the fields covered by WTO rules, e.g. sanitary and phytosanitary customs calculation, anti-dumping, technical barriers to trade; as well as any other trade-related domestic regulation, e.g. environmental standards, export credit schemes.

Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept.¹⁸⁴

This jurisprudential definition broadened the scope of ORCs beyond the meaning of Article XI of the GATT (the elimination of quantitative restrictions introduced or maintained by countries on the importation or exportation of products).¹⁸⁵ It should be emphasized nevertheless that although this definition is broad, it is exclusive to the construction of ORCs in paragraph 5 and not in paragraph 8, because otherwise CU members would have to harmonize all, not just substantially all, trade-related regulations, which is beyond the requirements of Article XXIV.¹⁸⁶ Scholars argue in this regard that rules of origin should be considered ORRCs and not ORCs since rules of origin are measures taken upon or after the formation of RTAs (i.e. FTAs), and there is no pre-formation in ORCs.¹⁸⁷ In other words, rules of origin limit the scope of trade liberalization and restrict it, thus they have to

¹⁸² *Turkey—Textiles AB Report*, *supra* note 44, ¶¶ 53.

¹⁸³ Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs*, 79 N.D. L. REV. 879, 897 (2003).

¹⁸⁴ Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 9.120, WT/D34/R (Oct. 22, 1999) [hereinafter *Turkey – Textile Panel Report*].

¹⁸⁵ MATHIS, *supra* note 8, at 252.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 253.

comply with the “substantially all the trade requirement” in paragraph 8.¹⁸⁸ In addition, both the Panel and the AB in the *Turkey—Textiles* case stipulated that “the effects of the resulting trade measures and policies of the new regional trade agreement shall not be more trade restrictive overall, than were the constituent countries’ previous trade policies.”¹⁸⁹

With respect to FTAs, Article XXIV:5(b) reaffirmed what was mentioned in paragraph (a). Article XXIV:5(b) added that the duties and ORCs of each individual FTA member-country imposed on third parties “shall not be higher or more restrictive” after the formation of the FTA than they were before the formation.¹⁹⁰ In other words, ORCs should be comprehensively examined before and after the FTA enters into force. The complexities of paragraph (a) do not exist in paragraph (b) since FTAs are not required to have a CET; rather, each member maintains its duties as those duties were with third parties.¹⁹¹

Another question that is imperative to consider is whether rules of origin are ORCs or ORRCs. Scholars like Mathis opt for considering rules of origin as ORRCs because rules of origin play a role in defining “substantially all the trade” in FTAs under Article XXIV:8.¹⁹² Thus, as the representative of Hong Kong, China SAR argued in a CRTA meeting, “the less stringent the preferential rules of origin are for a RTA, the higher percentage of their members’ intra-RTA trade will be included towards meeting the [substantially all the trade] threshold.”¹⁹³ Conversely, another opinion indicates that rules of origin should be considered either ORCs or ORRCs in light of the RTA in question and in accordance with the effects the rules of origin have on the regional members and third parties.¹⁹⁴ However, it is necessary to adopt a feasible method to compare individual members’ tariff rates with

¹⁸⁸ *Id.*

¹⁸⁹ *Turkey—Textiles AB Report*, *supra* note 44, ¶ 55.

¹⁹⁰ GATT, *supra* note 2, art. XXIV:5(b).

¹⁹¹ *See* Hafez, *supra* note 183, at 897.

¹⁹² MATHIS, *supra* note 8, at 168.

¹⁹³ World Trade Organization, Comm. on Reg'l Trade Agreements, *Statement by the Delegation of Hong Kong, China on Systemic Issues*, WT/REG/W/27 (Jan. 4, 1998) [hereinafter CRTA WT/REG/W/27].

¹⁹⁴ Regional Trade Agreements, *supra* note 68, ¶ 52.

the degree of protection which rules of origin produce.¹⁹⁵ In fact, such an analogy is hard given the fact that measuring the restrictiveness of rules of origin is intractable.

Rules of origin are per se a challenge for free trade due to their complexity and variety.¹⁹⁶ Rules of origin vary within the same jurisdiction; for instance, there are “fourteen different preferential rules [of origin] in the European Communities, [and] six in the United States....”¹⁹⁷ Rules of origin constitute another trade obstacle because: first, RTAs typically create loose rules of origin in order to control the flow of trade; and second, rules of origin divert trade by diminishing non-regional input in regional products.¹⁹⁸

In sum, both paragraphs 8(a)ii and 5(a) and (b) deal with the issue of CUs. Paragraph 8(a)(ii) requires a substantial harmonization in ORCs with non-regional trade partners.¹⁹⁹ paragraph 5 (a) requires RTAs to have their *ex post* ORCs to be no more restrictive than *ex ante* ORCs.²⁰⁰

4. “Reasonable Length of Time” Article XXIV:5(c)

Although Article XXIV did not impose specific conditions on interim agreements as it did with CUs and FTAs, Article XXXIV:5 still requires interim agreements to “include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.”²⁰¹ In connection with this, interim agreements do not have to liberalize “substantially all the trade” between member-states.²⁰² Rather, Article XXIV deems interim agreements as a transition phase until the FTA or the CU is fully implemented.²⁰³ In other words, an

¹⁹⁵ MATHIS, *supra* note 8, at 168.

¹⁹⁶ Bhala, *supra* note 71, at 664.

¹⁹⁷ *Id.*

¹⁹⁸ OECD *Rules of Origin*, *supra* note 68, at 5.

¹⁹⁹ GATT, *supra* note 2, art. XXIV:8.

²⁰⁰ GATT, *supra* note 2, art. XXIV:5.

²⁰¹ GATT, *supra* note 2, art. XXIV:5(c).

²⁰² WTO, SYNOPSIS OF "SYSTEMIC" ISSUES RELATED TO REGIONAL TRADE AGREEMENTS WT/REG/W/37 available at http://www.wto.org/english/tratop_e/region_e/wtregw37_e.doc

²⁰³ *Id.* “Any interim agreement . . . shall include a plan and schedule for the

interim agreement must lead to a formation of either a CU or an FTA and shall not be a type of a preferential arrangement that does not conform to the conditions of Article XXIV.²⁰⁴

The meaning of "reasonable," however, was always controversial.²⁰⁵ RTAs often exploited the flexibility of the word "reasonable" to have an interim agreement for long periods of time with insubstantial trade liberalization, such as the twenty-two year interim agreement of the European Economic Community's (EEC) association agreement with Greece.²⁰⁶ In this light, WTO members agreed that a "reasonable length of time" should not exceed ten years unless exceptional circumstances require otherwise.²⁰⁷ RTA members who believe that their interim agreements should exceed ten years have to provide an explanation of those exceptional circumstances to the WTO Council on Trade in Goods.²⁰⁸ Another challenge that the concept of interim agreements presents is that parties to RTAs do not typically illustrate how the RTA will be created through the "plan and schedule" they adopt.²⁰⁹

formation of such a customs union or of such a free-trade area within a reasonable length of time."

²⁰⁴ See *id.*

²⁰⁵ See WTO, SYNOPSIS OF "SYSTEMIC" ISSUES RELATED TO REGIONAL TRADE AGREEMENTS WT/REG/W/37, 18-19 available at http://www.wto.org/english/tratop_e/region_e/wtreg_w37_e.doc.

²⁰⁶ See Association of Greece with the European Economic Community, *Report adopted on 15 November 1962*, L/1829 (Mar. 1963), GATT B.I.S.D. (11th Supp.) at 149, 149-50 (1963).

²⁰⁷ See Article XXIV Understanding, *supra* note 49, ¶ 3.

²⁰⁸ *Id.* An issue that is likely to appear if they notified the Council after the agreement enters into force, particularly if the Council was not convinced of the RTAs' explanation for having more than a 10-year period for an interim agreement. A similar issue is likely to appear if a CRTA found that a given RTA does not conform to the condition set forth in Article XXIV. Typically, RTAs notify the Council of when their agreement has entered into force, and the Council and the CRTA will have, on average two years to complete its review, however they will not be able to prevent violations from occurring during the review. Further, it would be hard to modify the agreement after that because the parties may have spent years negotiating it. See, e.g., BHALA, *supra* note 71, at 624 (noting that the WTO has never completed a review for any interim agreement, and the average time to review agreements is between three months and four years).

²⁰⁹ DAM, *supra* note 102, at 282.

C. Procedural Conditions

1. Notifying the CONTRACTING PARTIES: Article XXIV:7

The main objective of notification is to ensure that RTAs have fully complied with the requirements of Article XXIV.²¹⁰ In other words, if parties did not provide the WTO with their plans and schedule to create an RTA, the WTO would not be able to verify the compatibility of the RTA in question with the requirements spelled out in Article XXIV. In 1971, the GATT members agreed that RTAs have the duty to report the developments of their agreements every two years.²¹¹ Both Article XXIV:7, and paragraph 11 of the *Understanding* stress that WTO members should notify the WTO when they intend to form an RTA. Paragraph 11 of the *Understanding*, in particular, requires WTO members to notify the WTO after they make substantial changes to their RTAs.²¹² WTO member-states also have the duty to explain how their interim agreements will lead to the formation of CUs or FTAs.²¹³ The CRTA, in turn, issues reports on RTAs and updates the WTO's General Council on the ongoing regional activities of members.²¹⁴

In July, 2006, the WTO's Negotiating Group on Rules approved a new transparency mechanism for all RTAs.²¹⁵ The new transparency mechanism states that Members that are party to an RTA must announce and notify the WTO of that RTA as soon as possible, and, for that purpose, define clear timetables.²¹⁶ This

²¹⁰ See WTO, Report (1996) of the Committee on Regional Trade Agreements to the General Council, WTO Doc. WT/REG/2, (June 11, 1996) (stating that one of the mandates of the CRTA is to examine the compliance of RTAs to the applicable law).

²¹¹ See *Programme of Work of the Contracting Parties, Summing up by the Chairman*, L/3641 (Apr. 1972), GATT B.I.S.D. (18th Supp.) at 37, 38 (1972).

²¹² See Article XXIV Understanding, *supra* note 49, ¶ 11.

²¹³ GATT, *supra* note 2, art. XXIV:5(c).

²¹⁴ See generally Comm. on Reg'l Trade Agreements, *Report of the Committee on Regional Trade Agreements to the General Council*, WT/REG/2 (June 11, 1996).

²¹⁵ See Negotiating Group on Rules, *Transparency Mechanism for Regional Trade Agreements*, JOB(06)/59/Rev.5 (June 29, 2006) [hereinafter *Transparency Mechanism*] (Draft Decision).

²¹⁶ *Id.*

transparency mechanism will be highlighted in Section I as one of the institutional efforts the WTO has made to put RTAs in order.²¹⁷

2. *Negotiations with Third Parties: Article XXIV:6*

Article XXIV:6 requires CU members to enter into negotiations with third parties if the formation of the CU affects those third parties.²¹⁸ The primary objective of the negotiations is to provide compensatory adjustment in light of the change of duties after the formation of the CU.²¹⁹ Since GATT Article XXVIII contains guidelines to balance the concessions among GATT members,²²⁰ Article XXIV:6 provides that the procedures set forth in Article XXVIII shall apply.²²¹

The *Understanding* affirmed the requirements of Article XXIV:6 and added that negotiations should either start “before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.”²²² The *Understanding*, however, indicates that for affected parties, “due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union.”²²³ If those reductions were not satisfactory compensatory adjustment per se, third parties shall consider other offers made by the CU.²²⁴ Otherwise, if the CU and third parties do not reach an agreement, the latter can retaliate.²²⁵ Nevertheless, the *Understanding* emphasized that the negotiations should be conducted in good faith²²⁶ and these negotiations are to

²¹⁷ *Id.*

²¹⁸ GATT, *supra* note 2, art. XXIV:6.

²¹⁹ *Id.*

²²⁰ See Panel Report, *European Communities—Measure Affecting the Importation of Certain Poultry Products*, ¶ 215, WT/DS69/R (Mar. 12, 1998) [hereinafter *European Communities – Measure Affecting*].

²²¹ GATT, *supra* note 2, art. XXIV:6.

²²² Article XXIV Understanding, *supra* note 49, ¶ 4.

²²³ *Id.* ¶ 5.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* ¶ 5.

continue as long as it is possible to reach an agreement.²²⁷

Article XXIV:6 was discussed in the *Turkey—Textiles* case when India argued that “there was no corresponding mechanism for renegotiation and compensation for members affected by the introduction or the increase of quantitative restrictions which were otherwise WTO incompatible.”²²⁸ India emphasized that the increase of tariffs and duties was negotiable pursuant to Article XXIV:6, and renegotiable under Article XXVIII, whereas the introduction of quantitative restrictions was incompatible with the GATT unless an exception applies.²²⁹ In other words, India called on the Panel to read paragraph 6 separately from paragraph 5. Furthermore, India invoked paragraph 4 of the *Understanding on Article XXIV* which deals only with the raising of tariff and duties, not quotas.²³⁰

Turkey argued that India’s interpretation was at odds with Article XXIV:5(a), which includes conditions for forming CUs, particularly where India claimed that regulations of commerce should not on “the whole be more restrictive than the regulations of commerce applicable in the constituent territories prior to the formation of the customs union.”²³¹ Turkey explained that Article XXIV:5 did not require an evaluation of the overall incidence of regulations of commerce if, as India claims, the regulations of commerce of the Turkey-EC CU could not “be determined by pre-existing restrictive measures applied by the European Communities.”²³² Eventually, the Panel found that

[b]y requiring an examination of changes in applied duties, the provisions of Article XXIV:5(a) are made unambiguously distinct from those in Article XXIV:6, since the level of applied duties, unlike bound tariffs, is not regulated in the WTO framework of rights and obligations. Since the analysis of applied duties is a basic tool in appraising the impact of actual border barriers on trade opportunities, we consider that the requirement of an overall assessment of the incidence of duties

²²⁷ Article XXIV Understanding, *supra* note 49, ¶ 5.

²²⁸ *Turkey—Textiles Panel Report*, *supra* note 184, ¶ 9.114.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* ¶ 9.115.

²³² *Turkey—Textiles Panel Report*, *supra* note 184, ¶ 9.115.

based on applied duties clearly points at the economic nature of the assessment under paragraph 5(a)²³³ Thus, in the adoption of the common external tariff of a customs union, compensation is due if a pre-existing tariff binding is exceeded.²³⁴

D. The Scope of Article XXIV: Article: XXIV:5

1. The Agreement on Safeguards

In general, GATT Article XIX permits members to depart temporarily from their obligations under the GATT, and apply safeguards if "any product is being imported . . . in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory"²³⁵ The member intending to apply safeguards, however, ought to consult with members affected by the measures.²³⁶ If an agreement is not reached, the party seeking to implement emergency measures shall be free to go ahead with the safeguards within 90 days.²³⁷ In critical situations in which damage would be difficult to repair, emergency measures may be implemented without consultation.²³⁸ In either case, the measures should be applied in a non-discriminatory manner.

The *WTO Agreement on Safeguards* came with additional rules on safeguards.²³⁹ For example, members who wish to apply safeguard measures have to notify the Committee on Safeguards of their intended measures.²⁴⁰ The *Agreement on Safeguards* also requires conducting national investigations and tests before implementing the safeguard measures.²⁴¹ Moreover, the

²³³ *Id.* ¶ 9.118.

²³⁴ *Id.* ¶ 9.127.

²³⁵ GATT, *supra* note 2, art. XIX:1(a).

²³⁶ *Id.* art. XIX:2.

²³⁷ *Id.* art. XIX: 3.

²³⁸ *Id.* art. XIX: 2.

²³⁹ See Agreement of Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 112 (1994) [hereinafter Safeguards Agreement].

²⁴⁰ *Id.* art 12.

²⁴¹ *Id.*

Agreement on Safeguards prohibits grey area measures.²⁴²

The AB in *Argentina—Footwear* dealt with safeguards and emphasized the importance of applying the conditions of safeguards.²⁴³ The Panel in the *Argentina—Footwear* case held that safeguards should satisfy two main conditions: first, “the developments which led to a product being imported in such increased quantities and under such conditions as to cause serious injury to domestic producers must have been ‘unexpected;’”²⁴⁴ second, the importing member has to demonstrate that it “has incurred obligations under GATT 1994, including tariff concessions.”²⁴⁵ Another jurisprudential condition, prohibiting parallelism in applying safeguards, will be highlighted below. Parallelism in safeguards means excluding certain trading partners from the application of the safeguards, while including the partners’ imports from the injury’s calculation.²⁴⁶ Countries might want to exclude regional imports from safeguards to maintain a positive political atmosphere with their regional partners as well as to avoid trade retaliations.²⁴⁷

The question of the relationship between Article XXIV and

²⁴² See *id.* art. 11(b) (prohibiting gray area measures by stating that “a member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side”).

²⁴³ *Argentina—Footwear AB Report, supra* note 164, ¶ 86-97.

²⁴⁴ *Id.* ¶ 91.

²⁴⁵ *Id.*

²⁴⁶ The concept of parallelism comes from Articles 2.1 and 2.2 of the Safeguards Agreement which states:

1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
2. Safeguard measures shall be applied to a product being imported irrespective of its source.

Safeguards Agreement, *supra* note 239, arts. 2.1, 2.2.

²⁴⁷ See, e.g., Charles Owen Verrill, NAFTA and the Steel Section 201 Safeguard Action 10 (May 28, 2003) (unpublished article) available at <http://www.wrf.com/docs/publications/11514.pdf> (discussing why the United States excluded NAFTA’s steel imports from the safeguards measures in the *United States - Steel* case).

safeguards (i.e. the *Agreement on Safeguards*) has several aspects. The first aspect is the relationship between the general conditions of safeguards with RTAs. The second aspect is when to exclude regional imports from safeguards measures. The third aspect is whether Article XXIV can be used as a defense when applying safeguards.

a. The General Conditions of Safeguards and RTAs

The *Argentina—Footwear* case considered the conditions that should be satisfied by a country wanting to impose safeguards on imports.²⁴⁸ With respect to the requirement that the surge in imports, which causes or threatens to cause injury, one can conclude that it is a requirement which is fulfilled all the time because “[i]t is hard to imagine how a dispute could arise without [the existence of] such an obligation”²⁴⁹ This means that such surge occurs by default once WTO Members commit, pursuant to the WTO Agreements, to allow unimpeded flow of trade into their territory, thus the question becomes whether the surge is threatening the domestic producers or is likely to threaten them. Nonetheless, it can be concluded that the condition of proving causation between the injury to domestic goods and the injured country’s GATT obligations can lead to the exclusion of regional imports from the calculation of the injury if the country applying the safeguards wants to exclude the regional imports from the measures. More broadly, the injured party could exclude the tariff concessions or obligations required by the GATT 1994.²⁵⁰ In other words, before applying the safeguards, a nexus between the injury on the domestic industry, GATT obligations and tariff concessions should be established. This reading of the requirement echoes the AB’s confirmation in the *Argentina—Footwear* case that parallelism is prohibited when calculating the injury to the domestic market.²⁵¹

An important question arises about the relationship between Article XXIV and safeguards: if Article XXIV:8 permits the

²⁴⁸ *Argentina—Footwear AB Report*, *supra* note 164, ¶¶ 86-97.

²⁴⁹ Alan Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2003 16 (Univ. of Chi., John Olin Law & Economics Working Paper No. 187 (2d Series)).

²⁵⁰ See Pauwelyn, *supra* note 153, at 112.

²⁵¹ See *Argentina - Footwear AB Report*, *supra* note 164, ¶¶ 103, 111.

application of safeguard measures between regional partners, can a country exclude regional goods from the safeguards? As noted, it is inconsistent with the legal texts and the WTO jurisprudence to exclude regional imports from safeguards if they were included in the calculation of injury (parallelism).²⁵² The question that will naturally arise, however, is whether Article XXIV provides a defense if safeguards were exclusively applied to non-regional imports, even if the regional imports were excluded from both the calculation and the measures. Generally speaking, the AB in the *Turkey—Textiles* case set two conditions that must be satisfied to recognize Article XXIV as a defense for violating other GATT articles in light of Article XXIV:5.²⁵³ First, the measure in question “is introduced upon the formation of a customs union that fully meets the requirements of [Article XXIV:8(a) and 5(a)]”,²⁵⁴ and second, the party wanting to depart from the GATT obligations “must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.”²⁵⁵ However, some scholars rightly argue that the two conditions set forth are hard to apply to the case of safeguards.²⁵⁶ The first concern is that safeguards are adopted as emergency measures when injury or threat of injury arises *after* the formation of an RTA and not *upon* its formation.²⁵⁷ The second reason is that proving that an RTA’s formation will be prevented unless the safeguards are activated is difficult (the necessity test).²⁵⁸ Thus the best way to address the legality of safeguards in RTAs is by determining whether the RTA satisfies the conditions of Article XXIV:5 (i.e. restrictions on trade with third parties “shall not on the whole be higher or more restrictive than the general incidence” of the duties and regulations prior to the formation of RTAs), and Article XXIV:8 (i.e. the elimination

²⁵² See *supra* text accompanying note 165.

²⁵³ GATT, *supra* note 2, art. XXIV:5 (“Accordingly, the provisions of this Agreement shall not prevent . . . the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area . . .”).

²⁵⁴ *Turkey—Textiles AB report*, *supra* note 44, ¶ 58.

²⁵⁵ *Id.*

²⁵⁶ See, e.g., Pauwelyn, *supra* note 153, at 132.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 133.

of restrictions on “substantially all the trade” between regional members).²⁵⁹ In other words, in light of Article XXIV:5, safeguards should not, in principle, be easier to apply to third parties after the formation of the RTA vis-à-vis its pre-formation. Likewise, pursuant to Article XXIV:8, “substantially all [regional] trade” should be liberated already before safeguards enter into force.²⁶⁰

With respect to the requirement of there being unexpected developments that lead to an injury or a threat of injury to the domestic market, one can argue that a WTO member should not include the regional product in the calculation of the injury. This is because an increase in the regional importation after the country enters into an RTA is not an unexpected or unforeseen development that justifies including the regional imports. Indeed, an increase in regional imports is a natural result of creating RTAs.

b. Article XXIV as a Defense

Footnote 1 of Article 2.1 of the *Agreement on Safeguards* discusses the use of safeguards by CUs on behalf of all members of a CU or on behalf of a single member state.²⁶¹ Footnote 1 of Article 2.1 reads as follows:

A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.²⁶²

²⁵⁹ *Id.* at 135, quoting GATT, *supra* note 2, arts. XXIV:5, 8.

²⁶⁰ *Id.*

²⁶¹ Safeguards Agreement, *supra* note 239, at n.1 (however, it does not mention FTAs).

²⁶² *Id.* at n.1.

Footnote 1 of Article 2.1 of the *Agreement on Safeguards* has been discussed in two WTO cases.²⁶³ First, in the *Argentina—Footwear* case, the AB examined facts showing that Argentina interpreted the footnote of Article 2.1 of the *Agreement on Safeguards* to exclude Mercosur members from Argentina's safeguard measures on footwear products.²⁶⁴ The AB reversed the Panel's finding and held that "the footnote only applies when a customs union applies a safeguard measure as a single unit or on behalf of a Member State."²⁶⁵ Accordingly, the AB found that Mercosur had not applied the safeguards measures at issue; rather, the measures had been imposed by Argentina on behalf of itself.²⁶⁶ Thus Argentina could not benefit from the defense of Article 2.1's footnote.²⁶⁷ The AB also ruled against Argentina's parallelism in applying the safeguards, because

Argentina's investigation, which evaluated whether serious injury or the threat thereof was caused by imports from all sources, could only lead to the imposition of safeguard measures on imports from all sources. Therefore, we conclude that Argentina's investigation, in this case, cannot serve as a basis excluding imports from other MERCOSUR member States from the application of the safeguard measures.²⁶⁸

One might wonder, however, if excluding the regional imports violates Article 2.2 of the *Agreement on Safeguards* which requires that "[s]afeguards . . . be applied to a product being imported irrespective of its source."²⁶⁹ The answer is no if they were not included in the injury determination.²⁷⁰ This answer rests on the remark that the AB in the *United States—Line Pipe* case made, that safeguards "may be applied only to the extent that they

²⁶³ *Argentina—Footwear AB Report*, *supra* note 164; Appellate Body Report, *United States—Definitive Safeguards Measures of Wheat Gluten Products from European Communities*, WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *United States—Wheat Gluten AB*].

²⁶⁴ *Id.* ¶¶ 106-08.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* ¶ 113.

²⁶⁹ Safeguards Agreement, *supra* note 239, art. 2.2.

²⁷⁰ *US—Line Pipe AB*, *supra* note 138, ¶ 260.

address serious injury attributed to increased imports.”²⁷¹ The AB, in highlighting this, emphasized that safeguards should only be a tool to limit damages and not discriminate or create barriers on trade, while taking into consideration the regional arrangement.²⁷²

The AB in the *Argentina—Footwear* case did not base its ruling on the nature of the legal nexus between Article XXIV and the *Agreement on Safeguards* because the AB believed that Argentina did not raise the defense of Article XXIV in its arguments.²⁷³ Rather, Argentina invoked Article XXIV before the Panel by arguing that Article XXIV:8(a)(i) or (b) did not mention Article XIX “among the exceptions from the requirement to abolish all duties and other restrictive regulations of commerce on substantially all the trade between the constituent territories of a customs union or a free trade area.”²⁷⁴

The other case that should be highlighted is the *United States—Definitive Safeguards Measures of Wheat Gluten Products from European Communities* case.²⁷⁵ The United States in this case excluded Canada’s products from its safeguards investigation into wheat gluten products based on the fact that Canada is a NAFTA member.²⁷⁶ The United States argued before the AB that the Panel had not taken into consideration footnote 1 of the *Agreement on Safeguards*, and accordingly demanded the AB to assess the legal relevance of footnote 1 to the *Agreement on Safeguards* and GATT Article XXIV in regards to the issues raised in the case.²⁷⁷ The AB rejected the United States’ argument, and affirmed the Panel’s finding because the dispute “[did] not raise the issue of whether, as a general principle, a member of a free-trade area can exclude imports from other members of that free-trade area from the application of a safeguard measure.”²⁷⁸ As a result, the AB ruled that the United States violated the *Agreement on Safeguards* by excluding NAFTA

²⁷¹ *Id.*

²⁷² *See id.*

²⁷³ *Argentina – Footwear Panel Report*, *supra* note 160, ¶ 109.

²⁷⁴ *Id.* at ¶ 8.93.

²⁷⁵ *United States - Wheat Gluten AB*, *supra* note 263.

²⁷⁶ *Id.* ¶ 2.

²⁷⁷ *Id.* ¶ 13.

²⁷⁸ *Id.* ¶ 99.

members from safeguards without excluding them from the calculation of the injury.²⁷⁹

The Panel in the *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* case found that Article XXIV:5 can be used as a defense to Article 2.2 of the *Agreement on Safeguards*.²⁸⁰ This case revolved around a dispute over the United States International Trade Commission's decision in 1999 which imposed safeguard measures on imports of circular welded carbon quality line pipe.²⁸¹ The United States' measure consisted of a duty increase for a period of three years, effective beginning March 1, 2000.²⁸² The first 9,000 short tons of imports from each country, irrespective of their origin, were excluded from the duty increase.²⁸³ Canada and Mexico were entirely excluded from the safeguard measure.²⁸⁴ The Panel concluded that the U.S. line pipe measure imposed was done inconsistently with the GATT 1994 and/or the *Safeguards Agreement*.²⁸⁵ The Panel asserted that there is a "[c]lose interrelation between Article XIX and the Safeguards Agreement," and "[t]hus if an Article XXIV defense is available for Article XIX measures, by definition it must also be available for measures covered by the disciplines of the Safeguards Agreement."²⁸⁶ However, the AB in the *U.S.—Line Pipe* case reversed this finding, and deemed it moot and of no legal effect,²⁸⁷ because, according to the AB, a relationship between Article 2.2 of the *Agreement on Safeguards* is not relevant unless two conditions apply.²⁸⁸ The first condition is whether the regional excluded

²⁷⁹ *Id.* ¶ 100.

²⁸⁰ Safeguards Agreement, *supra* note 239 (expanding on how and when the safeguard measures provided for in GATT art. XIX can be imposed. Article 2.2 of the Safeguards Agreement requires safeguards to be applied in a non-discriminatory manner, irrespective of the source of the product).

²⁸¹ *United States—Line Pipe AB*, *supra* note 138, ¶ 2.

²⁸² *Id.* ¶ 6.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *United States—Line Pipe*, *supra* note 138, ¶ 8.1.

²⁸⁶ *Id.* at ¶ 7.150.

²⁸⁷ *United States—Line Pipe AB*, *supra* note 138, ¶ 199.

²⁸⁸ *Id.* ¶ 198.

imported goods “*are not considered* in the determination of serious injury.”²⁸⁹ The second condition is whether the WTO’s investigation concluded that there was proof that imported products from third parties produce serious injury by themselves, and thus “satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2.”²⁹⁰ The AB concluded that neither of these conditions existed in the case, and as a result, the American exception made from safeguard measures in favor of NAFTA products was not justified.²⁹¹ In holding this, the AB did not rule against the interpretation of the panel that a nexus exists between the *Agreement on Safeguards* (i.e. Article 2.2) and Article XXIV of the GATT.²⁹² Simultaneously, the AB’s finding indicates that Article XXIV can be connected to the *Agreement on Safeguards* solely after the principle of parallelism is satisfied. Consequently, discriminatory safeguards in favor of regional imports fall under the jurisdiction of Article XXIV.

*c. When to Include Regional Imports in the
Calculation of Injury*

Excluding regional imports is not mandatory when the country wanting to apply safeguards is in the course of investigating and ultimately determining the injury.²⁹³ Article 2.1 of the *Agreement on Safeguards* indicates that the product in question should merely be “imported . . . in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury to the domestic industry. . . .”²⁹⁴ Accordingly, the said Article does not specify the origin of imports that are under investigation.²⁹⁵

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* ¶ 51.

²⁹³ *United States—Line Pipe*, *supra* note 138, ¶ 198.

²⁹⁴ *Safeguards Agreement*, *supra* note 239, art. 2.1.

²⁹⁵ See Pauwelyn, *supra* note 153, at 115 (noting that Article 2.1 of the *Agreement on Safeguards* only defines the limits of the investigation into the relevant import vis-à-vis the imports, and the effect of such imports on the market without imposing restrictions regarding “the *origin* of the increased imports that can or must be taken into account in an injury determination”).

The *United States—Line Pipe* case tackles this issue, addressing whether or not excluding regional imports is mandatory when the country wanting to apply safeguards is in the course of investigating and ultimately determining the injury.²⁹⁶ The AB report in the *U.S.—Line Pipe* case emphasized that,

[t]he question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement of Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury.²⁹⁷

Hence, Article 2 of the *Agreement on Safeguards* can be understood, pursuant to the *U.S.—Line Pipe* case, to give the option to either include all the regional and non-regional imports in the calculation of injury, provided that all imports, including the regional ones, will be subject to the safeguards, or exclude the regional imports from the calculation of the injury, thus excluding them from the application of safeguards in light of the concept of parallelism.²⁹⁸ The other case that echoes this finding is the *United States—Definitive Safeguard Measures on Imports of Certain Steel Products* case.²⁹⁹ In the *United States—Steel* case, the United States imposed safeguard measures on certain steel imports in the form of an increase in duties.³⁰⁰ The United States, however, excluded steel imports from Canada, Mexico, Israel and Jordan, pursuant to its FTAs with them, while considering their steel imports in the injury calculation.³⁰¹ The United States argued that it was not required to cite each step that the competent authority followed to recommend the safeguards and exclude FTA

²⁹⁶ *United States—Line Pipe*, *supra* note 138, ¶ 181.

²⁹⁷ *Id.* ¶ 198.

²⁹⁸ *Id.*

²⁹⁹ See Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS259/AB/R (Nov. 10, 2003) [hereinafter *United States—Steel Products AB*]; Report of the Panel, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R (Nov. 10, 2003)[hereinafter *United States—Steel Products*].

³⁰⁰ *Id.* ¶ 1.30.

³⁰¹ *Id.* ¶ 1.37.

products.³⁰² The Panel rejected this argument and found that the competent authority should establish that the products covered in the measure alone have caused serious injury to the domestic industry.³⁰³ Therefore, the Panel found that the United States violated the *Agreement on Safeguards* which required them to prove that the non-exempt imports caused injury to the domestic industry.³⁰⁴ In this case, the AB agreed with the Panel when the Panel stated that imports excluded from the calculation of injury must not be excluded from the safeguards pursuant to Article 4.2(b) of the *Agreement on Safeguards*.³⁰⁵ The Panel and the AB did not require that the regional imports be excluded from the safeguard measures; rather, it is possible to exclude regional imports from the safeguard measures provided that they are not considered in the original calculation of injury.³⁰⁶

1. *The Agreement on Textiles and Clothing*

During the negotiations of the Uruguay Round, GATT members agreed to incorporate the regulation of trade on textiles and clothing within the GATT's system.³⁰⁷ Annex 1A of the *WTO Agreements* encompasses the *Agreement on Textiles* which gradually ends the quantitative restrictions of the Multi-Fiber Arrangement (MFA),³⁰⁸ thus placing trade in textiles under the general rules of the GATT, and, in particular, subject to MFA.³⁰⁹ The *Agreement on Textiles* contained uniform multilateral trading standards to replace the unilateral and bilateral quotas that had persisted under the MFA.³¹⁰ In this light, the *Agreement on*

³⁰² *Id.* ¶ 10.592.

³⁰³ *Id.* ¶¶ 10.195-10.196.

³⁰⁴ *Id.*

³⁰⁵ See *United States—Steel Products AB*, *supra* note 299, ¶ 450.

³⁰⁶ *Id.*

³⁰⁷ Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 112, art. 9 (1994) [hereinafter Agreement on Textiles].

³⁰⁸ See Multi-Fiber Arrangement, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840 [hereinafter Multi-Fiber Arrangement] (formerly the Arrangement Regarding International Trade in Textiles). The Multi-Fiber Arrangement constituted an exception to MFN by which countries were allowed to place quantitative restrictions on textiles.

³⁰⁹ Agreement on Textiles, *supra* note 307.

³¹⁰ *Id.*

Textiles provides that

[t]his Agreement and all restrictions thereunder shall stand terminated on the first day of the 121st month that the WTO Agreement is in effect, on which date the textiles and clothing sector shall be fully integrated into GATT 1994. There shall be no extension of this Agreement.³¹¹

Hence, over a ten year time span, the quantitative restrictions agreed upon under the MFA were gradually phased out.³¹² By the end of the ten year period, in 2005, the trade in textiles and clothing were fully integrated within the GATT 1994.³¹³

The language of Article XXIV:5 indicates that it applies exclusively to inconsistencies in “this Agreement” (the GATT Agreement).³¹⁴ The AB in the *Turkey—Textiles* case confirmed this understanding by stating that Article XXIV:5 is only an exception for inconsistencies with GATT provisions.³¹⁵ The AB in the same case, however, departed from this point of view in deciding that Article XXIV:5 was applicable as a defense for inconsistencies with Article 2.4 of the *Agreement on Textiles and Clothing*.³¹⁶ The rationale of the AB is that Article 2.4 of the *Agreement on Textiles* incorporated the GATT’s provisions into its own provisions when it stated that “all such restrictions maintained between GATT 1947 Contracting Parties, and in place on the day before such entry into force, shall be governed by the provisions of this Agreement.”³¹⁷

2. Does Article XXIV Cover Other Agreements?

In light of the decisions of the *Turkey - Textiles*, *United States—Line Pipe*, and *United States - Wheat Gluten* cases, Article XXIV:5 is not a defense to inconsistencies with other WTO agreements unless there is an evident relationship between the

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ GATT, *supra* note 2, art. XXIV:5.

³¹⁵ *Turkey—Textiles AB Report*, *supra* note 44, at n.13 (mentioning that “that legal scholars have long considered Article XXIV to be an ‘exception’ or a possible ‘defense’ to claims of violation of GATT provisions”).

³¹⁶ *Agreement on Textiles*, *supra* note 307.

³¹⁷ *Id.* art. 2.1; *see also Turkey - Textiles AB Report*, *supra* note 44, at n.13.

WTO, the agreement in question, and the GATT articles.³¹⁸ Moreover, Article XXIV should not be a defense unless it is necessary for RTA member-countries to violate certain provisions of another WTO agreement to form the RTA. Furthermore, since other WTO agreements were incorporated together with the GATT into one regime, Annex 1A of the *Agreement Establishing the World Trade Organization* stated that if a conflict occurs between the GATT and other WTO agreements, the latter should prevail.³¹⁹ This means that the other WTO agreement in question should be examined to see if it permits the application of Article XXIV:5 to the provisions of the former.

E. The Relationship between the Paragraphs of Article XXIV

Paragraph 4 of Article XXIV paints the big picture.³²⁰ As set forth earlier, paragraphs 5 to 9 encompass conditions that RTAs have to observe.³²¹ The question that should be answered is what the relationship between those paragraphs is. Is the obligation spelled out in paragraph 4 fulfilled automatically when the conditions of the subsequent paragraphs are satisfied?³²²

The CRTA's discussions show that the parties were divided in answering this question.³²³ The first group, which included the EU, argued that when the conditions of paragraphs 6 to 9 are fulfilled, the requirement of paragraph 4 is satisfied as a matter of

³¹⁸ *Turkey – Textile Panel Report*, *supra* note 184; *United States—Line Pipe*, *supra* note 138; *United States—Wheat Gluten AB Report*, *supra* note 263.

³¹⁹ General Interpretative Note to Annex 1A, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 112; *see also, e.g.*, Laurent A. Ruessmann, *Reflections on the WTO Doha Ministerial Conference: Putting the Precautions on the WTO in its place: Parameters for the Proper Application of a Precautionary Approach and the Implications for Developing Countries in Light of the Doha WTO Ministerial*, 17 AM. U. INT'L L. REV. 905, 913 (2002) (underlining that according to Annex 1 A, the SPS Agreement takes precedent over the GATT in case of conflict between the two agreements).

³²⁰ GATT, *supra* note 2, art. XXIV:4.

³²¹ *Id.* ¶¶ 5, 6, and 9 contain the external requirements for forming RTAs; paragraph 7 contains the requirement of notification; and paragraph 8 encompasses the internal requirements for forming RTAs.

³²² MATHIS, *supra* note 8, at 231.

³²³ *See* CRTA, WT/REG/M/15, *supra* note 104.

fact.³²⁴ In other words, paragraph 4 is neither a substantive provision nor an independent cause of action.³²⁵ The delegation of Australia supported this reading, and maintained that paragraph 4 should be merely considered as a preamble to the conditions that follow in subsequent paragraphs.³²⁶ The second group contended that if new measures are implemented as a result of an RTA, this would be an increase in trade barriers against the language of paragraph 4. Thus paragraph 4 can be an independent cause of action regardless of whether the conditions of the other articles are fulfilled.³²⁷

Fortunately, the AB in the *Turkey—Textiles* case closed the gap between the two opinions by holding that

[p]aragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV.³²⁸

Similarly, in addressing paragraph 5, the AB links the term “accordingly” in paragraph 5 with paragraph 4 by finding that

[t]he text of the chapeau of paragraph 5 must also be interpreted in its context. In our view, paragraph 4 of Article XXIV constitutes an important element of the context of the chapeau of paragraph 5. The chapeau of paragraph 5 of Article XXIV begins with the word “accordingly”, which can only be read to refer to paragraph 4 of Article XXIV, which immediately precedes the chapeau.³²⁹

The linking paragraph 4 with other paragraphs is reminiscent of our earlier discussion with regard to the objective that paragraph 4 confirms, which is to facilitate trade and not to raise barriers.³³⁰ In other words, the discrimination against WTO Members that is exceptionally permitted by paragraphs 5 to 8 should also be examined to verify their consistency with paragraph

³²⁴ *Id.* ¶ 12.

³²⁵ *Id.*

³²⁶ *Id.* ¶ 13.

³²⁷ *Id.*

³²⁸ *Turkey - Textile AB Report, supra* note 44, ¶ 57.

³²⁹ *Id.* ¶ 56.

³³⁰ *See supra* notes 91-102 and accompanying text.

4. This is implicitly maintained by the AB in the *Turkey - Textiles* case when it declared that Article XXIV

can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.³³¹

F. RTAs of Developing Countries: the Enabling Clause

In 1979, GATT parties adopted the Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries (*Enabling Clause*).³³² The *Enabling Clause* was designed to permit developed countries to offer preferential tariff treatment to the imports of developing countries in order to introduce equivalent benefits to both of them.³³³ Similar to Article XXIV, the *Enabling Clause* permits preferential treatment for developing countries "[n]otwithstanding the provisions of Article I of the [GATT]."³³⁴ Paragraph 2(a) of the *Enabling Clause* provides that countries may extend tariff preferences to developing countries according to the Generalized System of Preference (GSP) adopted in 1968.³³⁵ In general, the *Enabling Clause* contains preferential treatment for developing countries such as reduced tariffs,³³⁶ special treatment for the least developed countries,³³⁷ and non-tariff measures governed by

³³¹ *Id.* ¶ 46.

³³² *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter *Enabling Clause*].

³³³ *Id.*

³³⁴ *Id.* ¶ 1.

³³⁵ Footnote 3 of the *Enabling Clause* refers to the GSP system initiated at UNCTAD II. The UNCTAD II participants adopted Resolution 21(II), "Recognizing unanimous agreement in favor of the early establishment of a mutually acceptable system of generalized non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries." See Conference on Trade and Development, New Delhi, India, 1968, *Report of the United Nations Conference on Trade and Development on Its Second Session*, Agenda Item 11, at 38, U.N. Doc. TD/97/Annexes (1968).

³³⁶ *Enabling Clause*, *supra* note 332, ¶ 2(c).

³³⁷ *Id.* ¶ 2(d).

instruments negotiated under the GATT.³³⁸

Before exploring the regionalism question, it is worth examining the nature of the *Enabling Clause* as seen by the AB in a relatively recent case, in which a question on the broadness of the *Enabling Clause* was thoroughly examined.³³⁹ In *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries* case, India successfully launched a complaint against the European Communities (EC) to challenge the conditionality of the voluntary preference scheme of the GSP. According to India, the scheme was incompatible with Article I of the GATT.³⁴⁰ India successfully argued that the EC's drug measures violated Article I of the GATT because they: (i) "discriminate between developing countries because they apply only to 12 developing countries;" (ii) were not beneficial to developing countries since "they created market access opportunities for some of them at the expense of others;" and, (iii) were only beneficial to Europe and not to developing countries.³⁴¹ The AB agreed with the Panel that the *Enabling Clause* is not a legal obligation per se, rather, it "contains requirements that are 'only subsidiary obligations, dependent on the decision of the Member to take [particular] measures.'"³⁴² Consequently, the AB rejected the EC's argument that the *Enabling Clause* was not an exception since exceptions permit Members to adopt measures to pursue objectives that are "not . . . among the WTO Agreement's own objectives."³⁴³ The AB found that the *Enabling Clause* is "in the nature of an exception" to Article I:1,³⁴⁴ and takes precedent over it should a conflict arise between them.³⁴⁵ The AB

³³⁸ *Id.* ¶ 2(b).

³³⁹ See Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003) [hereinafter *European Communities—Tariff Preferences*]; Appellate Body Report, *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *European Communities—Tariff Preferences AB*].

³⁴⁰ *European Communities—Tariff Preferences*, *supra* note 339, ¶ 4.8.

³⁴¹ *Id.* ¶ 4.41.

³⁴² *European Communities—Tariff Preferences AB*, *supra* note 339, ¶ 80.

³⁴³ *Id.* ¶ 93.

³⁴⁴ *Id.* ¶ 126.

³⁴⁵ *Id.* ¶ 101.

simultaneously reversed the Panel's finding that tariff preferences under the GSP should be identical for all developing countries by holding that preferential treatment should respond positively to financial and trade needs of each developing country.³⁴⁶ The AB did not clarify, however, how an agreement can be reached with respect to determining the needs of developing countries.³⁴⁷ In other words, the AB did not stipulate whether such determination should be made by the donor country, or the developing country, or both.³⁴⁸ Neither the AB nor the Panel outlawed the idea of conditionalities that are consistent and non-discriminatory.³⁴⁹

The *Enabling Clause* established requirements for both developing and developed countries when they form an RTA.³⁵⁰ Paragraph 3(c) requires that preferential treatment for developing countries "be designed . . . to respond positively to the development, financial and trade needs of developing countries."³⁵¹ On the other hand, developed countries may not exploit preferences "to create undue difficulties for the trade of any other contracting parties."³⁵² Further developed countries may not also seek concessions inconsistent with the needs of developing countries.³⁵³ Equally, developing countries are expected to "participate more fully in the framework of rights and obligations under the General Agreement."³⁵⁴

The *Enabling Clause* asserts, just like Article XXIV:3, that the main purpose of RTAs of developing countries should be to facilitate trade without hindering trade with other members.³⁵⁵ However, the *Enabling Clause* excludes RTAs among developing countries from many conditions mentioned in Article XXIV such

³⁴⁶ *Id.* ¶ 173.

³⁴⁷ See *European Communities - Tariff Preferences AB*, *supra* note 339.

³⁴⁸ PETROS MAVROIDIS, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE*, A COMMENTARY 249 (2005).

³⁴⁹ See *European Communities - Tariff Preferences AB*, *supra* note 339, ¶ 172.

³⁵⁰ *Enabling Clause*, *supra* note 332, ¶ 3.

³⁵¹ *Id.* ¶ 3(c).

³⁵² *Id.* ¶ 3(a).

³⁵³ *Id.* ¶ 5.

³⁵⁴ *Id.* ¶ 7.

³⁵⁵ *Enabling Clause*, *supra* note 332, ¶ 3.

as the “substantially all the trade” requirement.³⁵⁶

Some commentators argue that the *Enabling Clause* is an exception to Article I of the GATT and is not related to Article XXIV.³⁵⁷ Paragraph 2 (c) states that

The Provisions of paragraph 1 apply to . . .

(c) [r]egional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.³⁵⁸

The fact that this paragraph uses broader language to refer to RTAs (i.e. regional and global arrangements) than Article XXIV, which primarily regulated CUs and FTAs, makes the *Enabling Clause* an exception to Article I of the GATT and not to Article XXIV.³⁵⁹ The *Enabling Clause* also incorporates ambiguities that have not yet been clarified.³⁶⁰ Nonetheless, the *Enabling Clause* implied that this situation should not last if a given developing country’s economic stance improves.³⁶¹ Moreover, there is no definition in the GATT of the term “developing countries.”³⁶² In that light, Jackson asserts that “(the) GATT and its Article XXIV, as well as the more ambiguous legal framework of the 1979

³⁵⁶ *Id.* ¶ 2.

³⁵⁷ Hanna Irfan & Gabrielle Marceau, Is there a Necessity Test Within Article XXIV of the GATT 1994? And if so, is it Applicable to RTAs Among Developing Countries, Covered by the Enabling Clause? 6 (June 2005) (unpublished Paper Presented to the University of Edinburgh School of Law on Regional Trade Agreements).

³⁵⁸ Enabling Clause, *supra* note 332, ¶ 2(c).

³⁵⁹ *Id.* Another opinion which has not been adopted was raised by the dissent in the Indian case against the EC where the dissenting Member argued that the Enabling Clause is not an exception to Article I:1, because [i]n the Enabling Clause the CONTRACTING PARTIES in effect made the 1971 Waiver permanent, expanded the scope of authorized preferences to address other aspects of the “system” developed within UNCTAD, and added several important factors related to development and trade liberalization.” See *European Communities - Tariff Preferences*, *supra* note 339, ¶ 9.2 (determining that the Enabling Clause is not an exception to Article I:1 and that India has not made a claim under the Enabling Clause).

³⁶⁰ *Id.*

³⁶¹ See *European Communities—Tariff Preferences*, *supra* note 339, ¶ 7; see also PATRICK LOW, TRADING FREE: THE GATT AND U.S. TRADE POLICY 151 (1993).

³⁶² MAVROIDIS, *supra* note 348, at 248.

Enabling Clause, are grossly inadequate for the tasks required of a multilateral system to provide some sort of adequate supervision and discipline on certain of the more dangerous tendencies of trading blocks.”³⁶³

V. Regionalism in the General Agreement on Trade in Services

After the Uruguay Round, services started to become an integral part of many RTAs, including major ones like NAFTA.³⁶⁴ Since the GATT only regulates trade in goods, trade in services is beyond the scope of Article XXIV.³⁶⁵ Similar to Article XXIV, Article V of the *General Agreement on Trade in Services* (GATS) considered the issue of RTAs.³⁶⁶ Article V provides:

[The provisions of the GATS] shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement

- a. has substantial sectoral coverage,^[367] and
- b. provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through

³⁶³ JOHN JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 172 (1997).

³⁶⁴ Org. for Econ. Co-operation and Dev. [OECD], Working Party of the Trade Comm., *The Relationship Between Regional Trade Agreements and Multilateral Trading System Services*, 5, TD/TC/WP(2002)27/Final (Oct. 9, 2002) [hereinafter *OECD Trading System Services*].

³⁶⁵ Panel Report, *Canada – Certain Measures Affecting The Automotive Industry*, ¶ 10.271, WT/DS139/R (Feb. 11, 2002) [hereinafter *Canada – Autos*]. The panel recalled that “Article V provides legal coverage for measures taken pursuant to economic integration agreements, which would otherwise be inconsistent with the MFN obligation in Article II.”

³⁶⁶ General Agreement on Trade in Services, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments-- Results of the Uruguay Round, 33 ILM 1144 (1994) [GATS].

³⁶⁷ The original footnote in the text states that “[t]his condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.”

- i. the elimination of existing discriminatory measures, and/or
- ii. prohibition of new or more discriminatory measure, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Article XI, XII, XIV and XIV.³⁶⁸

In light of the text, we draw the following conditions that RTAs should observe when liberalizing trade in services.

A. "Substantial Sectoral Coverage"

Pursuant to paragraph 1(a) of Article V of the GATS, RTAs must have "substantial sectoral coverage" of the trade in services.³⁶⁹ The footnote of paragraph 1 emphasizes that the RTA should exclude *a priori* any mode of supply (i.e. cross-border supply, consumption abroad, commercial presence, and presence of natural persons).³⁷⁰ As the case of the term "substantially" in Article XXIV, the term "substantial" in "substantial sectoral coverage" is vague. It is not clear to what extent sectoral services ought to be liberalized to satisfy the requirement of substantial coverage.³⁷¹ Furthermore, the footnote of paragraph 1(a) constitutes a loose and flexible condition that can easily be misconstrued.³⁷² In this sense, it is hard to apply the rules of trade in goods to trade in services to specify the magnitude of trade coverage; the characteristics of trade in goods are different from trade in services. For example, while the tariff concept is the backbone of trade in goods, tariffs do not exist in trade in services. The only authoritative yet insufficient hint was provided by the Panel in the *Canada—Autos* case, which stated that "the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements."³⁷³

³⁶⁸ GATS, *supra* note 366.

³⁶⁹ *Id.*

³⁷⁰ See BERNARD HOEKMAN & MICHEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 250-51 (2001).

³⁷¹ GATS, *supra* note 366, art. V:1(a).

³⁷² *Id.*

³⁷³ *Canada – Autos*, *supra* note 365, ¶ 10.271.

B. Elimination of Discriminatory Measures

Paragraph 1(b) of the GATS states that RTAs should “provide for the absence or elimination of substantially all discrimination.”³⁷⁴ Similarly, Article V:6 of the GATS provides that MFN and national treatment principles apply to services as long as they engage in “substantive business operations” within the borders of the RTA.³⁷⁵ In this light, the determination of the scope of the Article V will depend on whether the list of paragraph 1(b) is exhaustive or indicative.

During the meeting of the CRTA in 1997, this issue was raised when the working parties were examining NAFTA.³⁷⁶ A party of members argued that the scope of permissible discrimination should be examined after specifying the implications of the use of “and/or” mentioned in paragraph 1(b)(i) of the GATS.³⁷⁷ Put differently, this point of view asserts that the “or” gives members the freedom to choose between the elimination of existing discriminatory measures and the preservation of the status quo.³⁷⁸ Other members, led by the EC, argued that Article V cannot be interpreted without reference to Article XVII (national treatment).³⁷⁹ Paragraphs (i) and (ii) are not alternatives, rather they are options that will be used to deal with the “substantially all discrimination” question on a case-by-case basis.³⁸⁰ Thus, paragraph 1(b) should be construed as a whole and in connection with other applicable provisions (i.e. GATS Article XVII).

Due to the fact that the “reasonable timeframe” in Article V:1(b) was not defined anywhere in the GATS, some scholars argue that it is possible to borrow the principles set forth in the *Understanding on Article XXIV* with regard to Article XXIV:5(c).³⁸¹ In other words, these scholars argue that the

³⁷⁴ GATS, *supra* note 366, art. V:1 (b).

³⁷⁵ *Id.* art. V:6.

³⁷⁶ World Trade Organization, Comm. on Reg'l Trade Agreements, Examination of the North American Free Trade Agreement, Note on the Meeting of 24 February 1997, ¶ 14, WT/REG4/M/4 (Apr. 16, 1997) [hereinafter CRTA WT/REG4/M/4].

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* ¶ 19.

³⁸⁰ *Id.*

³⁸¹ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WTO, TEXT, CASES AND

reasonable timeframe in Article V:1(b) should also be ten years.³⁸² Again, opening the door to apply the rules for goods to services should not happen automatically. A reasonable timeframe for eliminating barriers to trade in services might not be the same as is required for trade in goods. Services are liberalized by different regulatory mechanisms as compared with goods. Services do not involve the reduction or modification of price-based measures; rather, they are liberalized by the elimination or modification of regulations in the form of positive lists, negative lists, or other hybrid methods. Consequently, declaring that a ten-year period is a reasonable length of time might do more harm than good when dealing with services.

C. "Barriers to trade"

Paragraph 4 of Article V is equivalent to paragraph 4 of Article XXIV: both emphasize that RTAs should facilitate trade, and not raise barriers.³⁸³ Article V:4 in particular mentions that the RTAs should not raise the "overall level" of barriers to trade in services.³⁸⁴ This reminds us of the term "not on the whole higher" in Article XXIV:5(a) and (b).³⁸⁵ The only way to benefit from the discussions of Article XXIV in this regard is to determine the overall level of restrictions on services by establishing a method to compare restrictions on services before and after the RTA enters into force.

D. Developing Countries

In contrast with Article XXIV, Article V of the GATS in paragraph 3(a) emphasizes that developing countries should be treated favorably.³⁸⁶ This special treatment should be available "in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors."³⁸⁷

MATERIALS 665 (2005).

³⁸² *Id.*

³⁸³ GATS, *supra* note 366, art. V:4 & art. XXIV:5.

³⁸⁴ *Id.* at art. V:4.

³⁸⁵ *Id.* at art. XXIV:5(a) and (b).

³⁸⁶ *Id.* at art. V:3(a).

³⁸⁷ GATS, *supra* note 366, art. V:3(a).

E. Notification and Examination

Article V:7 requires RTAs to notify promptly the Council for Trade in Services about the economic integration in services and any other modifications thereunder.³⁸⁸ The CRTA will examine the arrangements and the modifications and report back to the Council.³⁸⁹ The Council may make recommendations as appropriate.³⁹⁰ No timeframes are provided to organize the examination process of arrangements in services, except the ninety-days advance notice that is stated in Article V:5 with respect to GATS inconsistent modifications.³⁹¹ It should be noted, however, that RTAs that involve services are covered by the new Transparency Mechanism, thus all deadlines and timeframes mentioned therein are applicable to GATS RTAs.³⁹²

VI. Efforts for Discipline

A. Institutional Efforts

1. The Understanding

The *Understanding* was a good step forward in many ways. The Preamble of the *Understanding* acknowledged the importance of RTAs to world trade and warned against the exclusion of major sectors from liberalization in RTAs.³⁹³ Moreover, the Preamble re-emphasized the role that the Council for Trade of Goods plays in reviewing RTAs.³⁹⁴ The *Understanding* clarified Article XXIV:5 by stating that the calculation to assess “duties and other regulations of commerce applicable before and after the formation” of a CU shall be based upon an overall assessment of

³⁸⁸ *Id.* at art. V:7.

³⁸⁹ *Id.* at art V:7(b).

³⁹⁰ *Id.* at art. V:7(c).

³⁹¹ *Id.* at art. V:5.

³⁹² *Id.* at art. III.

³⁹³ Article XXIV Understanding, *supra* note 49, at pmbl. (demonstrating that the “contribution [of RTAs] is increased if the elimination between the constituent territories of duties and other regulation of commerce extends to all trade, and diminished if any major sector of trade is excluded”).

³⁹⁴ *Id.*

weighted average tariff rates as well as applied tariffs.³⁹⁵ Likewise, it specified that “a reasonable length of time” should be no more than ten years which can only be extended in exceptional circumstances.³⁹⁶ Those RTAs wishing to have more than a ten-year interim agreement should provide a convincing explanation.³⁹⁷ The *Understanding* also demonstrated, while explaining Article XXIV:6, that negotiations with third parties should commence before the CET is implemented.³⁹⁸

As a practical matter, however, the *Understanding* has basically challenged the economic aspects of Article XXIV. The *Understanding* did not answer legal questions related to non-tariff barriers or the environment³⁹⁹ or tackle key terms in Article XXIV,⁴⁰⁰ until the *Turkey—Textiles* case, the term “substantially” had been a source of significant controversy for CUs.⁴⁰¹

2. *The Committee on Regional Trade Agreements*

As set forth earlier, Article XXIV:9 requires RTA member countries to produce all relevant information. This requirement that should have helped the CTRA review the compatibility of the RTA in question with the GATT and WTO agreements.⁴⁰² The CRTA,⁴⁰³ a body created in 1996, has two primary duties: first, to replace the working parties in reviewing the texts of RTAs under the GATT, GATS, or the *Enabling Clause* and second, to make systemic studies on RTA-related concerns and issues.⁴⁰⁴ The

³⁹⁵ *Id.* ¶ 2.

³⁹⁶ *Id.* ¶ 3.

³⁹⁷ *Id.*

³⁹⁸ *Id.* ¶ 5.

³⁹⁹ *Id.*

⁴⁰⁰ Article XXIV Understanding, *supra* note 49. For instance, the Understanding, did not tackle the meaning of “substantially all the trade,” “not on the whole higher or more restrictive,” “other regulations of commerce,” or “other restrictive regulation of commerce.”

⁴⁰¹ Raj Bhala, *The Forgotten Mercy: GATT Article XXIV:11 and Trade on the Subcontinent*, 2002 N.Z. L. REV. 301, 322 (2002).

⁴⁰² *Id.* at art. XXIV:9.

⁴⁰³ World Trade Organization, Comm. on Reg'l Trade Agreements, *Decision of 6 February 1996*, WT/L/127 (Feb. 7, 1996) [hereinafter CRTA WT/L/127].

⁴⁰⁴ See WTO.org, Work of the Committee on Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Sept. 18,

CTRA reports to the Council of the WTO, which adopts the report and makes recommendations.⁴⁰⁵

The CRTA has discussed systematic issues, particularly related to Article XXIV.⁴⁰⁶ In its meetings, the CRTA discussed controversial phrases in Article XXIV such as "substantially all the trade" with respect to the trade coverage discussed in Article XXIV:8, "the general incidents of duties and other restrictive regulations of commerce" in Article XXIV:5, and "not on the whole higher or more restrictive than the general incidence of commerce" in Article XXIV:5.⁴⁰⁷ The CRTA tackled critical questions including how to calculate the general incidence of duties after and before the formation of CUs and what the impacts would be of measures other than tariffs, such as anti-dumping, preferential rules of origin, technical standards, subsidies, and countervailing measures, yet it also recognized the complexity of the calculation.⁴⁰⁸ The CRTA further highlighted key issues, such as the relationship between Article XXIV and the *Understanding on Article XXIV*, and emphasized that "Article XXIV [. . .] must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article."⁴⁰⁹

The CRTA discussed more than once the trade diversion that occurs in cases where a member of an FTA maintains high levels or increases the levels of MFN protection, even within the bound tariff rates.⁴¹⁰ Moreover, the members of the CRTA debated the regulatory needs for CUs and FTAs as different modes of RTAs and noted that rules of origin have been a particular subject of controversy, especially since it is not clear whether those rules of origin could be classified as "other regulation[s] of commerce" under Article XXIV:5(b).⁴¹¹ Last but not least, the CRTA has

2007).

⁴⁰⁵ *Id.*

⁴⁰⁶ *See id.*

⁴⁰⁷ *Turkey—Textiles AB Report*, *supra* note 44, ¶¶ 9.189.

⁴⁰⁸ World Trade Organization, Comm. on Reg'l Trade Agreements, *Checklist for Systemic Issues Identified in the Context of the Examination of the Regional Trade Agreements*, Note by the Secretariat, ¶ 15, WT/REG/W/12 (Feb. 10, 1997) [hereinafter CRTA WT/REG/W/12].

⁴⁰⁹ *Understanding on Article XXIV*, *supra* note 49, ¶1.

⁴¹⁰ CRTA WT/REG/W/12 *supra* note 408, ¶ 8.

⁴¹¹ *See* SYNOPSIS OF "SYSTEMIC" ISSUES RELATED TO REGIONAL

always been concerned about transparency, thus it suggested the statistics which should be provided when fulfilling the notification requirement of Article XXIV:7.⁴¹²

The CRTA, however, faces many challenges in reviewing RTA reports. First, some WTO members do not provide or delay providing accurate information about their RTAs.⁴¹³ Second, the large number of RTAs makes it even harder for the CRTA to accurately review all of them in a timely manner.⁴¹⁴ Third, the CRTA has never been specific and precise in its reports.⁴¹⁵ In other words, the CRTA has on only one occasion recommended that a given RTA has not satisfied the conditions of Article XXIV. This exception was in the case of the *Czech Republic-Slovakia CU*.⁴¹⁶ As a result, WTO Members which are parties to RTAs have not taken the CRTA seriously, and they have presumed that RTAs are consistent with Article XXIV upon their formation and not upon their examination.⁴¹⁷ Last but not least, although rules of origin are a major topic in RTAs, the CRTA has not sufficiently shed light on them.⁴¹⁸

Commentators like Mathis suggest that if parties do not disclose all information necessary to enable the working groups to conduct an accurate review and analysis, RTAs may not argue that

TRADE AGREEMENTS WT/REG/W/37 (Mar. 2000), ¶ 31.

⁴¹² CRTA WT/REG/W/12, *supra* note 408 ¶ 19.

⁴¹³ Hafez, *supra* note 183, at 899.

⁴¹⁴ See World Trade Organization, Comm. on Reg'l Trade Agreements, *Report (2005) of the Committee on Regional Trade Agreements to the General Council*, WTO Doc. WT/REG/15 (Nov. 3, 2005) [hereinafter CRTA WT/REG/15].

⁴¹⁵ See WTO, REPORT OF THE COMMITTEE ON REGIONAL TRADE AGREEMENTS TO THE GENERAL COUNCIL, Oct. 11, 1999, WT/REG/8, available at [http://docsonline.wto.org/GEN_](http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/REG/8.DOC.HTM)

[viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/REG/8.DOC.HTM](http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/REG/8.DOC.HTM) ("The CRTA has only made progress on factual examination of RTAs without delivering substantive results").

⁴¹⁶ Peter Sutherland et al., *Consultative Bd. to Director-General Supachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millennium* 1 (2005), ¶77, available at http://www.wto.org/english/wtoe/10anniv_e/future_wto_e.pdf [Sutherland Report].

⁴¹⁷ See WTO, General Council—*Minutes of Meeting (held on 18 and 19 July 2001)*, WTO Doc. WT/GC/M/66. Issue 13 (a) (the chair of the Committee complaining about the ineffectiveness of the CRTA).

⁴¹⁸ MAVROIDIS, *supra* note 348, at 246.

Article XXIV:7 has been satisfied.⁴¹⁹ Moreover, Mathis suggests that an additional consensus from the review group be obtained at the outset with respect to the sufficiency of the information included in the plan and schedules.⁴²⁰

B. The Transparency Mechanism

Clearly, the Transparency Mechanism was a result of the demise of the CRTA. After the inefficiency of the CRTA became a major setback for the WTO, its members agreed to implement a new transparency mechanism for RTAs.⁴²¹ The CRTA could not issue reports on systematic issues. By this, the CRTA created an impression that it was not capable of dealing with RTAs anymore, and the dispute settlement system should deal with the RTAs that are inconsistent with the applicable law. Thus, according to the Director General of the WTO, Pascal Lamy, the introduction of this mechanism will help, at a critical juncture in the broader Doha round of negotiations, to break the logjam in the WTO on RTAs, and to ensure that RTAs become “building blocks of, and not stumbling blocks to, world trade.”⁴²²

The Transparency Mechanism requires members to newly signed RTAs to provide the WTO with basic information on the RTA and all relevant contact information, such as the timetables of the liberalization of trade, preferably in an electronic exploitable method.⁴²³ This step should be fulfilled before the final ratification of the RTA takes place. Once the RTA is ratified, the Mechanism requires that members of the newly formed RTA must notify the WTO “as early as possible.”⁴²⁴ The drafters correctly did not leave the meaning of “as early as possible” to

⁴¹⁹ MATHIS, *supra* note 8, at 100. Mathis has built his conclusion on invoking the *EEC—Import Regime for Bananas* case, DS38/R (1994), which found that the ECC cannot argue that it duly notified the working groups of the Lomé Convention because the ECC did not request to have the Lomé Convention examined pursuant to Article XXIV:7.

⁴²⁰ *Id.*

⁴²¹ See GATS, *supra* note 366, at art. III.

⁴²² WTO.org, Lamy Welcomes WTO Agreement on Regional Trade Agreements, http://www.wto.org/english/news_e/news06_e/rtajuly06_e.htm (last visited on Sept. 19, 2007) (WTO 2006 News Item from July 10, 2006).

⁴²³ See *Transparency Mechanism*, *supra* note 215, ¶ A:1:b.

⁴²⁴ *Id.* ¶ B:3.

speculation, but rather, they defined it in the same paragraph to be upon the RTA's ratification and before the RTA enters into force.⁴²⁵ This notification must include all parts of the agreements, such as annexes, protocols, and all related schedules.⁴²⁶ Once all parts of the agreement are available to the WTO, it should start the examination process according to a precise timetable which does not exceed one year after the date of notification.⁴²⁷ To facilitate the factual examination that the CRTA is responsible for at this stage, the Mechanism encourages RTA members to provide the CRTA with electronic versions of the agreements within ten weeks, or twenty weeks if the RTA involves only developing countries.⁴²⁸ Similarly, the Mechanism encourages RTAs to fully disclose all relevant data by stating that the WTO's factual presentation "shall not be used as a basis for dispute settlement procedures or to create new rights and obligations for Members."⁴²⁹ With this in mind, the WTO should make all data provided by an RTA available for the member participating in the meeting dedicated to the consideration of the RTA.⁴³⁰ If the participating members have any questions or comments, the WTO Secretariat should convey such information to the members of the RTA at least four weeks before the meeting.⁴³¹ The Secretariat on its part coordinates the exchange to ensure that all information, questions, and answers are ready at least three working days before the corresponding meeting.⁴³²

The Transparency Mechanism also covers the post-implementation phase for all RTAs.⁴³³ Section D:14 of the Mechanism states that "[t]he required notification of changes affecting the implementation of an RTA, or the operation of an already implemented RTA, shall take place *as soon as possible*

⁴²⁵ See *id.*

⁴²⁶ See *id.* ¶ B:4.

⁴²⁷ See *id.* ¶ C:5.

⁴²⁸ See *id.* ¶ C:8.

⁴²⁹ *Transparency Mechanism*, *supra* note 215, ¶ C:10.

⁴³⁰ *Id.* at ¶ C:7(b).

⁴³¹ *Id.* at ¶ at C:12.

⁴³² *Id.*

⁴³³ *Id.* ¶ D:14.

after the changes occur.”⁴³⁴ Unlike Section B:3, Section D:14 did not define “as soon as possible.”⁴³⁵ However, in light of the Section B:3 interpretation that “as soon as possible” indicates that member parties have the duty to notify the WTO upon the RTA’s ratification and before the RTA enters into force, it is reasonable to conclude that subsequent changes should be reported to the WTO before they enter into force.⁴³⁶ This also applies to RTAs that are already in force, thus any changes made to any RTA whose report was already adopted by the WTO should comply with paragraphs D to G of the Mechanism, paragraphs that deal with the notification of subsequent changes to RTAs.⁴³⁷

The transparency mechanism is to be implemented on a provisional basis.⁴³⁸ Members will review, modify, and replace the provisional mechanism, as needed, with a permanent mechanism adopted as part of the overall results of the Doha Round.⁴³⁹ A thorough reading of Section H, however, will trigger a few questions. Section H reads as follows:

This Decision shall apply, on a provisional basis, to all RTAs. With respect to RTAs already notified under the relevant WTO transparency provisions and in force, this Decision shall apply as follows:

- a. RTAs for which a working party report has been adopted by the GATT Council and those RTAs notified to the GATT under the Enabling Clause will be subject to the procedures under Sections D to G above.
- b. RTAs for which the CRTA has concluded the “factual examination” prior to the adoption of this Decision and those for which the “factual examination” will have been concluded by 31 December 2006, and RTAs notified to the WTO under the Enabling Clause will be subject to the procedures under Sections D to G above. In addition, for each of these RTAs, the WTO Secretariat shall prepare a factual abstract presenting the features of the agreement.

⁴³⁴ *Id.* (emphasis added).

⁴³⁵ *Transparency Mechanism*, *supra* note 215, ¶ D:14.

⁴³⁶ *Id.*

⁴³⁷ *See id.* ¶ H:22.

⁴³⁸ *Id.*

⁴³⁹ *See id.* ¶ I.

c. Any RTA notified prior to the adoption of this Decision and not referred to in subparagraphs (a) or (b) will be subject to the procedures under Sections C to G above.⁴⁴⁰

With respect to paragraph a, it is not clear whether the drafters of this paragraph intended to include RTAs that are also adopted by the WTO, just as it did with those adopted by the GATT council.⁴⁴¹ As the Mechanism itself emphasizes the role of the CRTA as the executive body that replaced the GATT working parties who were dealing with the notification of RTAs, the drafters should have made reference to the WTO instead of “the GATT Council.”⁴⁴² Otherwise, a reader would conclude that paragraph H:22:a applies only to RTAs adopted before 1995, and not to RTAs adopted by the WTO. Put differently, the latter reading of Section H:22:a excludes RTAs adopted by the WTO from reporting any changes to the WTO pursuant to paragraphs D to G of the Mechanism. Keeping in mind that the majority of RTAs were founded after the WTO was created, Section H:22:a becomes meaningless if RTAs adopted by the WTO prior to the Mechanism did not have to notify the WTO of changes to their agreements in accordance with the Transparency Mechanism.

It should also be noted as well that Section H:22:c requires all other RTAs that were notified to the WTO, before the CRTA has started their factual examination, to comply with paragraphs C to G of the Mechanism, thus they benefit from the new and expedited procedures of notification set forth above.⁴⁴³ They will also enjoy the fact that factual presentations will not “be used as a basis for dispute settlement procedures or to create new rights and obligations for Members.”⁴⁴⁴ Parties of RTAs under Section H:22:c will nevertheless have to comply with the new and expedited timetables and provide the WTO with the required data, preferably in an electronic exploitable form.

Finally, it should be noted that the Transparency Mechanism does not refer to the dispute settlement system’s role in collaborating with the CRTA in enforcing the applicable law on

⁴⁴⁰ *Id.* ¶ H.

⁴⁴¹ *Transparency Mechanism*, *supra* note 215, ¶ H:22(a).

⁴⁴² *Id.*

⁴⁴³ *Id.* at H:22(c).

⁴⁴⁴ *Id.* ¶ C:10.

RTAs. The only mention of the dispute settlement system was in paragraph C:10, where it was mentioned to assure the members that the “factual presentation shall not be used as a basis for dispute settlement procedures or to create new rights and obligations for Members.”⁴⁴⁵

1. *Judicial Intervention: the Impact of DSU*

As the forgoing discussion reveals, the WTO era has witnessed the emergence of new jurisprudence on RTAs. Remarkable cases such as the *Turkey—Textiles*, *Canada—Certain Measures Affecting the Automotive Industry*, *Argentina—Footwear*, *United States—Line Pipe*, and *United States—Wheat Gluten* cases have played a key role in clarifying vague terms in Article XXIV.⁴⁴⁶ In the *Canada—Autos* case, for instance, Canada awarded a duty-free treatment to specified commercial vehicles by certain manufacturers.⁴⁴⁷ Canada justified this treatment by local regulations and NAFTA.⁴⁴⁸ The Panel noted in its decision that Canada’s favorable treatment was not awarded only to Mexico and the United States, but it was also awarded to non-NAFTA parties.⁴⁴⁹ Accordingly, the Panel stated that Article XXIV is no defense to justify measures granted to non-RTA members; Canada did not appeal the Article XXIV issues.⁴⁵⁰

In fact, one of the most evident Uruguay Round achievements is the reform in the dispute settlement mechanisms, particularly in dealing with RTAs.⁴⁵¹ Formerly, GATT panels could not make binding interpretations with respect to questions concerning RTAs, thus the decisions in some cases that dealt with RTA issues were

⁴⁴⁵ *Id.*

⁴⁴⁶ *Turkey—Textiles AB Report*, *supra* note 44; *Canada-Autos*, *supra* note 346; *Argentina—Footwear*, *supra* note 104; *US—Line Pipe*, *supra* note 138; *US—Wheat Gluten AB Report*, *supra* note 263.

⁴⁴⁷ *Canada-Autos*, *supra* note 346, at 5.162.

⁴⁴⁸ *Id.* at 7.42. The Canadian laws that the duty-free treatment was passed under were the Canadian Customs Tariff, the Canadian Motor Vehicles Tariff Order 1998, and the Special Remission Orders. *See id.* ¶¶ 2.1-2.33, 10.1-& 10.1-10.8.

⁴⁴⁹ *Id.* at 7.44.

⁴⁵⁰ *Id.*

⁴⁵¹ *See* Ministerial Declaration: Adopted on 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, ¶ 29 (Nov. 20, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

not adopted (i.e. *Banana I* and *Banana II* cases).⁴⁵² This deficiency in the GATT judicial system could be attributed to two main factors: first, the GATT dispute settlement system per se could not issue binding decisions because losing parties could block the adoption of decisions and second, there was uncertainty regarding the jurisdiction of the GATT panels on RTAs.⁴⁵³

In the GATT 1947 era, GATT dispute settlement panels examined Article XXIV. In 1985, a dispute arose between the United States and the EC regarding preferential treatment given by the EC to some of its Mediterranean partners in violation of GATT Article I (MFN principle).⁴⁵⁴ The panel held that “examination – or re-examination – of Article XXIV agreements was the responsibility of the Contracting Parties.”⁴⁵⁵ Put differently, the panel was unpragmatic in reading Article XXIV as it strictly interpreted the absence of a clear language giving it the authority to decide cases related to Article XXIV thus indicating an absence of jurisdiction over Article XXIV disputes.⁴⁵⁶ Instead, the Panel declared that the article only mentioned that the “Contracting

⁴⁵² See e.g., Report of Panel, *European Community -- Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, ¶ 4.15, L/5776 (Feb. 7, 1985) (unadopted) (the Panel held that

[T]he examination - or re-examination - of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES. In the absence of a decision by the CONTRACTING PARTIES and without prejudice to any decision CONTRACTING PARTIES might take in the future on such a matter, the Panel was of the view that it would not be appropriate to determine the conformity of an agreement with the requirements of Article XXIV on the basis of a complaint by a contracting party under Article XXIII:1(a)).

See also Panel Report, *ECC-Member States' Import Regimes for Bananas*, DS32/R (June 3, 1993)[hereinafter *Import Regimes for Bananas I*]; Panel Report, *ECC-Member States' Import Regimes for Bananas*, DS38/R (Feb. 11, 1994)[hereinafter *Import Regimes for Bananas II*].

⁴⁵³ See the *Turkey—Textiles* case, Panel Report, *supra* note 184, at 9.51 (denying that there was any legal basis to prevent the WTO Panels to exercise their jurisdiction on Article XXIV controversies).

⁴⁵⁴ Report of Panel, *European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, ¶ 4.15, L/5776 (Feb. 7, 1985) (unadopted).

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 59 (stating that Article XXIV is outside the scope of the dispute settlement panel).

Parties” are responsible for observing the implementation of the article.⁴⁵⁷ Undoubtedly, this formalistic approach not only showed the defects of Article XXIV, but it also showed the weakness of the GATT dispute resolution mechanism.

The GATT dispute settlement dealt with other RTA related cases in the early 1990s: *Bananas I* and *II*.⁴⁵⁸ Neither of the decisions from *Bananas I* and *II* were ever adopted, therefore they had no legal effect whatsoever. The reasoning in both cases is worth highlighting because of the pragmatic analysis. In *Banana I*,⁴⁵⁹ and *II*,⁴⁶⁰ the facts revolved around EC restrictions on the importation of bananas, while excluding bananas of certain African, Caribbean, and Pacific countries. Major banana exporters filed a complaint before the GATT dispute settlement panel claiming that the EC had violated Article I of the GATT (MFN principle).⁴⁶¹ The EC argued that GATT panels should not have jurisdiction to adjudicate Article XXIV matters in connection with its new measurements.⁴⁶² In both *Bananas I* and *II*, the panels correctly pointed out that Article XXIV disputes fall under the jurisdiction of GATT panels.⁴⁶³ The panels in both cases contended that the party which invokes Article XXIV as a defense has the burden of proving that it has met the Article’s requirements.⁴⁶⁴

The aforementioned factors that were hindering the judicial role from being effective have disappeared in the WTO era. The decisions of the WTO panels are binding, and both the *Understanding* and the *Turkey—Textiles* case confirmed the authority of the WTO panels to adjudicate RTA related cases and

⁴⁵⁷ See generally Hafez, *supra* note 183.

⁴⁵⁸ *Import Regimes for Bananas I*, *supra* note 352 and *Import Regimes for Bananas II*, *supra* note 452.

⁴⁵⁹ *Import Regimes for Bananas I*, *supra* note 452.

⁴⁶⁰ *Import Regimes for Bananas II*, *supra* note 452.

⁴⁶¹ The difference between *Bananas I* and *II* is that the complainants in *Bananas II* added further grounds for their arguments such as that the EC’s new measures are inconsistent with its previous declarations. The EC response is also amended according to the complainants’ arguments. See *id.* ¶ 34.

⁴⁶² See *Bananas II*, *supra* note 452, ¶ 45.

⁴⁶³ *Import Regimes for Bananas I*, *supra* note 452; *Import Regimes for Bananas II*, *supra* note 452.

⁴⁶⁴ *Id.*

the authority of the CRTA and WTO Panels to examine.⁴⁶⁵ Thus, most recently, in *Mexico—Tax Measures on Soft Drinks and Other Beverages*, the United States complained about certain tax measures imposed by Mexico on soft drinks and other beverages that use any sweetener other than cane sugar.⁴⁶⁶ The United States claimed that these taxes were inconsistent with paragraphs 2 and 4 of Article III of the GATT.⁴⁶⁷ Mexico argued, *inter alia*, that the WTO should decline to adjudicate the case because the dispute should be taken by the United States to a Chapter 20-NAFTA arbitral panel.⁴⁶⁸ Mexico claimed that the arguments that were available to it under the NAFTA dispute settlement system were not available under the WTO Agreements.⁴⁶⁹ Simultaneously, according to Mexico, the United States would suffer no prejudice if the dispute were heard by NAFTA's arbitral panels pursuant to NAFTA Article 301.⁴⁷⁰ Mexico also contended that if the WTO refused to grant its preliminary request, it would be unable to deliver a secure and positive resolution to the dispute pursuant to Article 3.7 of the *DSU*.⁴⁷¹

The Panel refused to grant Mexico's request because, according to Article 11 of the *DSU*,⁴⁷² the Panel did not have the discretion to deny hearing the case. The Panel emphasized that in

⁴⁶⁵ See Article XXIV Understanding, *supra* note 49, ¶ 12; see also *Turkey—Textiles AB Report*, *supra* note 44, ¶¶ 9.52, 9.53. The Panel noted that “the issue regarding the GATT/WTO compatibility of a customs union, as such, is generally a matter for the CRTA since . . . it involves a broad multilateral assessment of any such custom union, i.e. a matter which concerns the WTO membership as a whole.”

⁴⁶⁶ Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005).

⁴⁶⁷ *Id.* at II:A(2.2).

⁴⁶⁸ *Id.* at III:3.2.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at C:4.107.

⁴⁷¹ *Id.* at E:4.163.

⁴⁷² Article 11 of the *DSU* provides that

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

DSU, *supra* note 91, art. 11.

that context, the United States had a legal right to bring the case before a WTO panel.⁴⁷³ Otherwise, according to the Panel, declining to adjudicate the case would diminish the rights of the United States as a complaining WTO member pursuant to Articles 3.2 and 19.2 of the *DSU*.⁴⁷⁴ Thus the Panel was not convinced by Mexico's arguments that the dispute is mostly linked to NAFTA as a regional agreement because nothing in NAFTA precludes the United States from bringing a claim before the WTO.⁴⁷⁵ On appeal, the AB agreed with the Panel.⁴⁷⁶

2. *Suggested Proposals*

Why should WTO Members consider reforms when dealing with the RTA issue? This author believes that first, rethinking the issue of regionalism will: protect third parties which, from an economic perspective, have been impacted by trade diversion; and second, preserving the WTO as the backbone of the global trade system will maintain its integrity. Hence, any formula of reform should encompass a legal aspect and a constitutional aspect.

Both the legal and constitutional aspects of reform can be fulfilled through a three-phase solution. The first phase is orchestrating a conference on RTAs in which the WTO reminds its members of the controversies that RTAs are generating by underscoring the adverse effects on the world economy in general, on the WTO's dignity in the short term, and on its existence on the long run. The WTO in such a conference should emphasize that it is a safety valve that once broken, will be hard to fix or replace, thus WTO Members understand that racing to craft violating RTAs will affect them all at some point. In such a conference, WTO Members should be invited to propose solutions and share their perspectives on the issue of RTAs. Ironically, at the conference, the WTO should encourage its members to think as a team to find solutions, and not exploit the meetings for negotiating regional deals (as some WTO Members, including the United States did in Cancun). The conference, should recommend *inter alia*, that the WTO forms a specialized committee—with adequate

⁴⁷³ *Mexico—Beverages* Panel Report, *supra* note 466, ¶ 7.1

⁴⁷⁴ *Id.* ¶¶ 7.1 & 7.7.

⁴⁷⁵ *Id.* ¶ 7.11.

⁴⁷⁶ *Mexico—Beverage Appellate Body Report*, *supra* note 466, ¶ 57.

representation of members—to draft an agreement on RTAs.

The second phase should be the drafting process of the agreement on RTAs within a defined timetable. The drafting committee should take into account the members' contributions at the conference, and seriously consider other scholarly suggestions. Equally fundamental is codifying the opinions of the WTO Panels that have dealt with RTA cases, and, in particular, considering a transformation of the legal interpretations of the *Turkey-Textiles* case on CUs into principles that can be applied to interpret similar terms with respect to FTAs. The agreement must, moreover, provide a legal frame work that unifies the applicable law (i.e. GATT Article XXIV, GATS Article V, the *Enabling Clause*, the *Understanding*, and the *Transparency Mechanism*) into one comprehensive legal instrument, thus abolishing the legal uncertainties that shadow the law and any contradictions that might exist. This phase should not take more than two years.

Once WTO Members approve the agreement, the third phase starts; this phase should never end. The third phase is monitoring the results and, specifically, the compliance with the new agreement. The CRTA should be armed with the required human and technological resources to conduct this new role. As will be revealed below, the CRTA should be proactive in this role, by having the standing to require violating RTAs to bring their agreement into conformity with the applicable law (the new agreement on RTAs). The WTO should also have the capacity to bring enforcement actions against RTAs for the violation(s) before the WTO DSB. It should be noted, nonetheless, that nothing in the applicable law gives the right to the WTO CRTA nor to the DSB to terminate a violating RTA; the best the WTO can ask for before the DSB is to bring the RTA into conformity with the applicable law, and suggest coercive measures in case of non-compliance. For this, Article XXIV:6 (or its equivalent in the proposed agreement on RTAs) can serve as a starting point for compensatory measures.⁴⁷⁷

The legal aspect should provide a framework that provides for an improved coherence between Article XXIV of the GATT,

⁴⁷⁷ Article XXIV:6 refers to Article XXVIII which allows modifications in tariffs and schedules in order to provide for compensatory adjustments for the increases rate of duty as a result of the creation of RTAs. See GATT, *supra* note 2, art. XXIV:6.

Article V of the GATS, the *Enabling Clause*, the *Understanding on Article XXIV*, and the *Transparency Mechanism*. Furthermore, the legal aspect of reform should offer clarifications of the controversial terms in the applicable law and explain the nexus between the applicable law and other WTO Agreements, such as the *Agreement on Safeguards*. In this light, the legal aspect should encompass a clarification of all the problematic terms in the law. Terms like “substantially all the trade,”⁴⁷⁸ “not on the whole higher or more restrictive,”⁴⁷⁹ “regulations of commerce,”⁴⁸⁰ “other restrictive regulation of commerce”⁴⁸¹ (Article XXIV), and “sectoral coverage”⁴⁸² (Article V of the GATS) and provide the different definitions to determine what each term means for FTAs on one hand and for CUs on the other.

Particular attention should be directed towards the question of the rules of origin since the multiplicity and complexity of rules of origin are principal factors in fragmenting the world trade order. Thus, a specific part in the proposed agreement on RTAs should be designated to provide general principles of harmonization in the criteria of tariff concessions and in rules of origin.

On the other hand, the constitutional aspect should aim to organize the legal and hierarchal relationship between the WTO and RTAs. In other words, this entails minimizing the jurisdictional conflict between the WTO dispute settlement system and the regional systems. The constitutional aspect involves organizing the hierarchal relationship between multilateralism and regionalism. This is a challenging task because, generally speaking, all treaties and international agreements are equal under international law.⁴⁸³ Furthermore, in dealing with conflict of treaties, one should investigate which treaty is more specific (*lex*

⁴⁷⁸ GATT, *supra* note 2, art. XXIV: 8(a).

⁴⁷⁹ *Id.* at art. XXIV:5(a) and (b).

⁴⁸⁰ *Id.* art. XXIV: 8(a).

⁴⁸¹ Article XXIV Understanding, *supra* note 49.

⁴⁸² GATT, *supra* note 2, art. V:1(a).

⁴⁸³ See Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 359 (Lorand Bartels & Federico Ortino eds., 2006), *supra* notes 1, 43, 51 (explaining that “[e]xcept for the United Nations Charter under Article 103, none of [the international agreements] prevails over another unless this is provided for by explicit treaty language either in a dominating or a submissive treaty”).

specialis) and which treaty is more recent (*lex posterior*) to decide which one prevails. In the case of RTAs, this approach will not be sufficiently helpful because one should examine each RTA versus the WTO Agreements to decide which of those would render the effort to provide a general and abstract law on the relationship between the WTO Agreements and RTAs senseless.

Simultaneously, the constitutional reform does not entail assimilating the regional trade order into the multilateral one since, as a matter of principle, mixing two legal “orders” generates disorder because each order has its own principles and objectives.⁴⁸⁴ Likewise, a complete segregation of legal orders like regionalism and multilateralism generates disorder because both function in the same international trade matrix. However, if both orders were to serve the same purpose, the result would be positive. As Adam Smith metaphorically puts it when arguing against mixing orders:

The man of system . . . seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chuse (sic) to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go on miserably, and the society must be at all times in the highest degree of disorder.⁴⁸⁵

The constitutional reform requires changes in both the legal norms of the WTO and in every RTA. This means that the WTO should (perhaps in the new agreement on RTAs) include a part that addresses the conflicts between the WTO laws and the legal provisions of RTAs. RTAs for their part, especially those which entered into force after the WTO Agreements took effect,⁴⁸⁶

⁴⁸⁴ See ADAM SMITH, *THE THEORY OF MORAL SENTIMENT* (1979).

⁴⁸⁵ *Id.* ¶ VI.II.42.

⁴⁸⁶ RTAs that entered into force after 1995 might refer to the principle of *lex posterior* to evade the effect of WTO Agreements in terms of conflict, thus it is critical

should make amendments to their agreements to recognize WTO Agreements as prevailing laws in case of conflict.

On the jurisdictional front, the DSB in the *Mexico—Beverages* case has already asserted, in light of Article 23 of the DSU, that nothing can stop the WTO Panels from exercising jurisdiction on disputes between regional members when a member of an RTAs brings claims to the WTO in its capacity as a member of the WTO.⁴⁸⁷ Even if a regional panel has issued a decision on the matter presented to the DSB for settlement, the principle of *res judicata* would not be applicable to erode the latter's jurisdiction since the DSB will be applying different laws (i.e. the WTO Agreements) and not the legal text of the relevant RTA.⁴⁸⁸ The WTO DSB, in light of Articles 13 and 11 of the DSU, may use evidence from the regional litigation to proceed with settling the dispute pursuant to the WTO law.⁴⁸⁹ This also should be codified in the proposed agreement on RTAs.

Bringing the multilateral order and regional order into a coherent or at least a non-contrasting form requires goodwill and *bona fide* resolve on the part of the WTO Members. Practically speaking, one cannot totally depend on such goodwill to fix the status quo because, in practice, as long as cooperation is voluntary, WTO Members will not react unless this reaction benefits them in any economic or political respect. WTO Members should be mindful that chaotic RTAs generate legal uncertainty in the international trade system and that they have already increased costs, and reduced "the quantity and time horizon of foreign trade and investments."⁴⁹⁰ Unless this is corrected, trade patterns including multilateralism and regionalism will form spontaneous trade orders which produce international trade practices without

to seal this loophole from the outset.

⁴⁸⁷ See *Mexico—Tax Measures on Soft Drinks and Other Beverages*, *supra* note 466.

⁴⁸⁸ See Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTRALIAN Y.B. ON INT'L L. 203 (1999) (arguing that litigating a case under one treaty does not prohibit litigating the case under another treaty).

⁴⁸⁹ Article 13 of the DSU gives the DSB the authority to ask the parties to supply any relevant information necessary to settle the dispute. Article 11 therefore requires the WTO Panels to objectively assess all information, facts and evidence in this regard.

⁴⁹⁰ ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 9 (1991).

coherence and consistency. This creates a fragmented multilateral trade order in which WTO Members tend to rest more on their regional arrangements than the directed and properly structured multilateral trade order.⁴⁹¹

Assuming that goodwill exists, the constitutional and legal aspects of reform should introduce rules that do not assume natural harmony, but rely on solidly grounded and enforceable rules capable of achieving an acceptable degree of harmonization between foreign trade and domestic laws and policies.⁴⁹² In this light, one of the most basic, yet effective, tools to ensure enforceability of rules is to agree on a legal liability mechanism that entails retaliation against violating RTAs (*pact sunt servanda*). This requires a centralized body (i.e. the WTO) to have the capacity to sue violating RTAs before the WTO Panels. Put differently, the WTO has to become not only the coordinator between its members with respect to international trade, but it has also to step forward and be an active player on the ground. This contributes to bringing the world trade back from a power oriented system that relies on bilateralism and negotiation powers to a rule-oriented system with established durable principles of law which reconcile the interests of all WTO Members, including those members who are actively seeking WTO-compliant RTAs.⁴⁹³

There have been constructive efforts to suggest reforms on the part of WTO Members and legal scholars as highlighted above. All these efforts should be taken into consideration by the WTO. In fact, such efforts have resulted in substantial and tangible achievements like the *Understanding on Article XXIV* in the Uruguay Round.⁴⁹⁴ For instance, since the *Understanding* stated

⁴⁹¹ See *id.* at 17. Petersmann divided international economic orders into “spontaneous” and “directed”. The spontaneous orders grow out of custom without initial overall design, while directed refers to the economic trade regimes that are created by international agreements. See generally, Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT’L L. & BUS. 39 (2006) (outlining how a weak multilateral system vis-à-vis RTAs is not desired).

⁴⁹² See *id.* at 62 (citing Hume, Smith and Kant who do not assume that individual interests are divergent and can only be reconciled by the observance of rules).

⁴⁹³ See *id.* at 104 (explaining that a power-oriented system asserts powers by bilateral negotiations, unilateral threat which aims at maximizing the negotiation capacity, and comparing it with a rule-oriented system which has sets of generally accepted rules that offer long term stability and predictability).

⁴⁹⁴ Article XXIV Understanding, *supra* note 49.

that interim agreements “should exceed ten years only in exceptional cases,” the number of violating RTAs to this requirement has been shrinking according to the WTO Secretariat report of 2002.⁴⁹⁵

VII. Conclusions

This article has attempted to highlight the major legal questions that occur when examining RTAs and their relationship with the WTO legal order. Although RTAs are an economic phenomenon in the first place, their legal aspect should not be underestimated. A healthy legal interaction between multilateralism and regionalism can ensure the integrity of the WTO, and simultaneously, can enable RTAs to be building blocks in the world trade order. However, so far there is no consensus on what is the best way to reform the relevant rules to minimize the loopholes that members to RTAs often exploit, albeit sometimes unintentionally.

The good news is that the WTO, and its members, are aware of the legal challenges that RTAs present. In his speech in Bangalore in January 2007, Pascal Lamy, the Director-General of the WTO, stressed that RTAs should not replace the multilateral system.⁴⁹⁶ He went beyond the traditional approach of criticizing RTAs and argued that they are not an easier way of facilitating trade, but rather, they complicate the trading environment by creating a web of incoherent rules, such as the numerous different rules of origin.⁴⁹⁷ In this light, he offers harmonizing rules of origin to simplify regional trade and enhance the relationship between multilateralism and regionalism.⁴⁹⁸ He also shared with the participants the WTO's attempts to contain RTAs, such as the

⁴⁹⁵ World Trade Organization, Comm. on Reg'l Trade, *Coverage, Liberalization Process and Transitional Provisions in Regional Trade Agreements, Background Survey by the Secretariat*, 18, WT/REG/W/46 (Apr. 5, 2002) (revealing that, for many of the RTAs entering into force in the latter half of the 1990s, “only in rare cases do transition periods exceed ten years”).

⁴⁹⁶ Pascal Lamy, Speech at Confederation of Indian Industries Partnership Summit 2007, Multilateral or bilateral trade agreements: which way to go? (Jan. 17, 2007) (transcript available at http://www.wto.org/english/news_e/sppl_e/sppl53_e.htm).

⁴⁹⁷ See *id.*

⁴⁹⁸ See *id.*

Transparency Mechanism.⁴⁹⁹

What is really puzzling is that those members who are meeting to discuss how to discipline RTAs are those who are negotiating RTAs at a rapid pace. By the same token, those WTO Members who form RTAs that are inconsistent with WTO rules are the same who agreed on the Transparency Mechanism in 2006 to enhance notification and examination of RTAs. These facts will render the attempts to accommodate RTAs in the multilateral system inefficient if the root cause of the problem is not addressed. In other words, unless Articles XXIV of the GATT and V of the GATS are clarified in light of the latest developments, it would be hard to make significant progress. It is true that the *Understanding on Article XXIV* was a remarkable step for clarifying, to some extent, the vague terms, but still, neither Article XXIV nor the *Understanding on Article XXIV* mention issues of emerging importance like investment and intellectual property, subjects that are increasingly being incorporated in RTAs.

It is crucial therefore to reform the applicable rules in a way that fosters cooperation between the multilateral and regional regimes, while attempting simultaneously to minimize the competition between them. This can be done both on the regional and multilateral level. On the regional level, RTAs should include provisions or phrases in their preamble that affirm the importance of being consistent with WTO laws. In this light, the true test for RTAs now is compliance with the Transparency Mechanism. On the multilateral level, the WTO should consider having a clause that emphasizes the supremacy of the WTO system over RTA laws. This would be very useful when conflicts of law occur between a regional law and the multilateral one. The Transparency Mechanism is also a test for the WTO; the WTO should consider having a CRTA that is adequately staffed and equipped to deal with the increasing number of RTAs.

⁴⁹⁹ *Id.*

